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Supreme Court of the United States

OCTOBER TERM, 1931

No. 287

THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY, *et al.*,

Appellants,

vs.

UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, *et al.*,

Appellees.

APPELLANTS' BRIEF

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November, 1931.

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Appellees.

APPELLANTS' BRIEF.

Opinion Below.

The opinion of the Court below (R. 698) is reported in 51 Fed. (2d) 510.

STATEMENT

This is an appeal from orders of the District Court denying an application for an interlocutory injunction suspending and enjoining *pendente lite*, the enforcement of an order of the Interstate Commerce Commission (R. 708). There were two cases below, one brought by the principal railroads affected by the order, and one by shippers claiming to be adversely affected thereby, which

were consolidated for hearing (R. 628). The applications were heard by the court below on bill and answer, supplemented by affidavits.

The questions presented are questions of law going to the validity of the order of the Commission and arising on the face of the petition, and which, although no final decree was entered below, are believed to be determinative of all issues presented.

The order of the Commission is contained in an original order entered July 1, 1930 (R. 273) and a supplemental order entered April 10, 1931 (R. 324). The order specifically prescribed (1) over 2,000 specific rates between so-called "key points" applicable to wheat and flour, and an equal number applicable to corn and other coarse grains, (2) certain "Interior Scales" for application to interior movements (R. 272) and (3) directed the carriers to establish rates between all other points "in reasonable relation" to the rates so prescribed (R. 111).

Some rates were increased but the reductions predominated to such an extent that the general level of the new rates is 13% below that of the old (R. 18, 636).

The resulting annual loss in revenues to the carriers is estimated by a concurring Commissioner at "at least $15,000,000 * * *—perhaps more" (R. 187), and by the carriers at approximately $20,000,000 (R. 18, 637-654).

The order complained of was made in a proceeding entitled "Rate Structure Investigation, Docket No. 17000" (R. 273). This proceeding was instituted by the Commission, pursuant to the Hoch-Smith Resolution (R. 45), as an inquiry into the entire rate structure of the country for the purpose of bringing the same into

harmony with all provisions of the Act, including Section 15a (R. 7, 45, 76, 273, 274). This general investigation was divided by the Commission into a number of parts, and one of these, Part 7, (hereinafter referred to as the "Grain Case" or the "present proceeding") was instituted to cover, among others, *all* of the rates of *all* of the carriers in the Western District (comprising two of the four rate groups into which the Commission has divided the United States pursuant to Section 15a (R. 8, 9, 10, 59, 75)) on grain and grain products (R. 7, 8, 59).

Prior to the adoption of the Hoch-Smith Resolution the Commission had twice approved the general level of the rates, *Kansas Public Utilities Commission* v. *A. T. & S. F. Ry.*, 83 I. C. C. 105 (R. 327), and *Rates and Charges on Grain and Grain Products,* 91 I. C. C. 105 (R. 341). The second of these cases was decided July 10, 1924, less than seven months prior to the adoption of the Resolution. In so doing, the Commission had found that the rates were not unreasonable, were not unfairly related to the rates on other commodities, did not impose an undue burden upon the grain traffic and could not be reduced consistently with the requirements of Sect[redacted]5a.

In *Rates and Charges on Grain and Grain Products, supra,* the Commission also carefully considered the condition of agriculture which it found to be depressed (R. 367-379, 399). It also found that the benefit, if any, accruing to the average farmer from a substantial reduction in rates would be slight (R. 386-7, 400), while the effect of such reductions upon the carriers' revenues and financial condition would be immediate and severe (R. 400). The report in the present proceeding found that

the condition of agriculture, although still depressed, was somewhat improved (R. 76-7), and that the effect of a reduction in rates on the producer was more or less speculative (R. 93).

It appears from the report that the carriers' rate of return and financial condition had not improved in the interim; that in the year last preceding the close of the record (1927; R. 8) such rate of return was 3.96 and that the average return for an eight year period considered by the Commission was 3.9 (R. 77). The Commission itself (through its legislative committee) is authority for the statement that the carriers have never, since the enactment of the Transportation Act, earned the fair rate of return contemplated thereby (R. 8, 521).

The rates established were established as the lowest possible lawful rates (R. 150, 168). This phrase owes its origin to the third paragraph of the resolution. The prescription of "the lowest possible lawful rates" presuppose the existence of other and higher figures, which, if prescribed, would have also been reasonable and lawful. The effect of the order is to reduce the revenues of the carriers, in the amounts stated, at a time when their rate of return was far below that contemplated by Sec. 15a. This effect resulted through the establishment of the lowest possible lawful rates on agricultural products affected by depression.

The Commission, in addition to twice approving the general level of the rates, had itself largely approved or prescribed the specific rates in effect (R. 13-14, 110, 327, 341). Included within these were rates approved or prescribed as maximum reasonable rates during the pendency

of the case (R. 23, 28, 29, 30). The rates so approved or prescribed are materially reduced by the order (R. 24, 28, 29, 30, 244 *et seq.*). Among them were rates approved or prescribed by the Commission, during the pendency of the present proceeding, as *maximum* reasonable rates subject only to the reserved jurisdiction to determine, in the present proceeding, whether they were also the *lowest possible lawful rates* referred to in the resolution (R. 23-4). The percentage of reduction made in these rates is approximately the same as that made in the general level of all rates (R. 250, 251, 247, 272).

The report contains no findings in respect of the relation of the rates to the rates on other commodities, or of the cost or value of the service, and no facts upon which findings in respect thereof could be predicated. In this it is in marked contrast to the cases decided prior to the adoption of the Hoch-Smith Resolution and to the reports of the Commission in other important cases relating to the reasonableness of rates under the standards of the Interstate Commerce Act. The facts appearing in the report are, in themselves, entirely insufficient to support the order, unless the Commission was empowered to establish the lowest possible rates on agricultural products affected by depression, by reason of such depression, and was directed by the resolution so to do. This appears to have been the conception of the Commission's powers and duties on which the order was based.

It appears from the report that although the carriers' rate of return was far below that contemplated by Section 15a, the Commission was of the opinion that the reductions required would not "threaten the maintenance

of an adequate system of transportation" (R. 148). The Commission appears to have been of the view that, by reason of the resolution, it was discharged, in this proceeding, from giving effect to the requirements of Section 15a in determining the rates to be established on agricultural products affected by depression, provided *only* that it was of the opinion that the action taken would not immediately threaten the maintenance of an adequate system of transportation. In this it is believed that the Commission erred. On this theory, however, a finding in respect of the effect of the action proposed upon the maintenance of an adequate system of transportation was the finding of a material fact. The finding so made was based upon matters outside the record (R. 31-32, 533).

The order of the Commission, entered July 1, 1930, was based on a record closed on September 22, 1928 (R. 8). Since the close of the record the earnings of the carriers and their financial condition have been adversely affected to a material and alarming degree on account of changed conditions subsequently arising and still present. Among such changed conditions is the continued and continuing decline both in gross and net revenues, which has taken place in spite of the drastic decreases in carriers' expenditures for maintenance and in the number of carriers' employees. The rate of return, which was 3.92 in 1927 (the year preceding the close of the record) and 4.35 in 1928 (the last year considered by the Commission in its report) (R. 77), had become reduced to 3.1 in 1930 (R. 518), and in January 1931 (when the carriers filed a second petition for rehearing) had been still

further reduced by reason of the continuing decline in the volume of traffic handled (R. 513).

These facts were brought to the attention of the Commission as they developed, (1) in a petition for rehearing filed on September 6, 1930 denied November 11, 1930 (R. 421), (2) in statements submitted on November 6, 1930 and November 26, 1930 (R. 501) by a committee of the Western Association of Railway Executives in support of an application for postponement by reason of then critical conditions of the carriers (R. 468) and (3) in a further petition for rehearing filed February 18, 1931 (R. 507). No effect was given by the Commission to the request of the Railway Executives, and the second petition was denied on March 3, 1931.

The carriers' second petition for rehearing set forth in great detail the facts bearing upon their existing financial condition and the effects of the order. It alleged, among other things:

> (1) That the carriers had never, since the enactment of the Transportation Act, received the fair rate of return contemplated thereby. That in the year 1929 their net railway operating income, the largest in their history, was $90,000,000, less than 5.75% on a minimum and inadequate basis of valuation (R. 521, 517).
>
> (2) That the report was based upon a record closed in September 1928, since which time conditions had materially altered for the worse (R. 510); that their net operating income for the year 1930 was less by more than $100,000,000 than the average net operating income for the five years immediately preceding (R. 519), and was not less

than $234,000,000, below the amount required to equal 5.75% on a minimum and inadequate valuation of the carriers' property (R. 518); and that their gross and net revenues in 1931 were materially below those of 1930 by reason of the continuing decline in the volume of traffic handled (R. 513).

(3) That since the close of the record the aforesaid and other changed conditions had been such as seriously to impair the credit and adversely to affect the marketability of their securities, to place in jeopardy the retention thereof as investments for savings banks and trustees, to threaten the maintenance of an adequate system of transportation, and to impair the ability of the carriers to provide the same (R. 529).

(4) In addition, they alleged and offered to prove that the traffic in grain and grain products, which the report shows constitute one of the largest single descriptions of traffic carried (it appearing from the report that 12.1% of the carriers' revenue is derived therefrom; R. 78) was the only major description of traffic, the volume of which had not declined during the present period of depression, and which was moving in substantially the same volume as at the time when the record was made up and closed; that said traffic was moving freely at existing rates and would not be increased by reduction therein, the volume of movement being determined by the size of the crop and not by the rates (R. 512-3).

In this petition also the carriers directed the attention of the Commission to:

(5) The fact that the Commission's finding in respect of the effect of the order upon the main-

tenance of an adequate system of transportation had been based upon estimates, which were not a part of the record, and in respect of which the carriers, prior to the making of the order, had had no opportunity to check the same, cross-examine their maker, or submit counter estimates. The petition further alleged and offered to prove that the Commission had underestimated the losses from the order and had overestimated increases in revenue, supposed to result from increases granted in other cases, and alleged and offered to prove that there were, in fact, no other cases out of which any substantial increases in the carriers' revenues would result from the action taken by the Commission (R. 533).

The order of the Commission had not at the time become effective. The powers and duties imposed by the Commission are of continuing character, including the duty imposed by Section 15a. Its orders should be responsive to conditions of the present and immediate future. It is believed that in denying this petition for rehearing, within thirteen days after it was filed, the Commission was actuated by a mistaken conception of its powers and duties, and particularly by a misconception of its duties, as affected by the Hoch-Smith Resolution, with regard to rates on agricultural products affected by depression. Otherwise, it is the contention of the carriers that, in denying said petition and by so doing requiring the order, based upon a record which had ceased to be representative of present or immediately future conditions, to become effective the Commission acted so arbitrarily and unreasonably as to render the same void.

SPECIFICATION OF ERRORS.

A specification of such of the points raised by the assigned errors as are intended to be urged, is that:

1. The District Court erred in not holding that the order of the Commission was void by reason of the fact that by employing the lowest possible lawful rates as a standard for the measurement of either the existing rates or for the determination of reasonable maximum rates under Sections 1 and 15 of the Interstate Commerce Act, the Commission exceeded its powers and duties (IV, VI, XIII).

2. The District Court erred in not holding that the order of the Commission was void because based upon a misinterpretation and misconception of Section 15a of the Interstate Commerce Act and of its powers and duties thereunder (X, XXV, XXVI).

3. The District Court erred in not holding that the order of the Commission was void because in the making thereof the Commission failed to give effect to the provisions of Section 15a and violated and disregarded its duties thereunder (IX, XXI).

4. The District Court erred in not holding that the order of the Commission was void by reason of the fact that in prescribing the lowest possible lawful rates as the maximum reasonable rates under Sections 1 and 15 of the Interstate

Commerce Act the Commission established grain and grain products as a favored class, applied thereto standards of reasonableness other than and different from those provided by the Interstate Commerce Act for the determination of reasonable rates on other commodities and relieved the same from making their proper contribution to the requirements of Section 15a of the Interstate Commerce Act, contrary to the powers and duties imposed upon the Commission by the Interstate Commerce Act (XII, XIII).

5. The District Court erred in not holding that the order of the Commission was void by reason of the fact that in considering the effect of the proposed reductions on the maintenance of an adequate system of transportation and in making its finding of fact in respect thereof, the Commission erroneously relied on and considered matters not of record in the proceedings before it (XI).

6. The District Court erred in not holding that the order of the Commission was void because based upon an erroneous interpretation of the Hoch-Smith Resolution and of its effect upon the powers and duties of the Commission under the Interstate Commerce Act (III, XIV).

7. The Court erred in not holding that the action of the Commission in denying the carriers' petitions for rehearing and by so doing in requiring the rates prescribed in its order to become

effective in the future without any rehearing because of changed conditions set forth therein, was taken in disregard of and in violation of the duties imposed upon it by the Interstate Commerce Act, was arbitrary and unreasonable, constituted an abuse of its administrative discretion and was in excess of the authority conferred upon it by law, denied to the carriers an opportunity to be heard, and constituted a denial of due process of law, in violation of the Fifth Amendment of the Constitution of the United States (XVI, XXVIII, XXIX).

8. The District Court erred in holding that the order complained of was supported and justified by the findings contained in the Commission's report and in not holding that the findings and recitals therein were insufficient to sustain the order (I, XXIII, XXIV, XXVII).

9. The Court erred in holding in effect that the statement of the Commission that its findings were made under the provisions of the interstate commerce act, was binding upon the Court in respect of the nature of the action taken by the Commission and the legal basis therefor, and that by reason of the inclusion of said statement in the report, any error which the Commission committed was one of fact and not of law (II, XXII, XXIV).

10. The District Court erred in not holding that it was not necessary either to reduce the

general level of rates on grain and grain products or the revenues of the carriers therefrom, in order to correct such inequalities and discriminations as the Commission found to exist, and that the reductions of such character, which were in fact made by the Commission, were not incidental to such corrections (XX).

11. The District Court erred in not holding that there was reasonable probability that the petitioners would succeed on final hearing (XIX).

12. The District Court erred in not finding that unless the order of the Commission was stayed or suspended through the granting of an interlocutory injunction, the petitioners would suffer irreparable injury (XVII, XVIII).

13. The District Court erred in finding that the temporary restraining order should be dissolved and application for temporary injunction should be denied, and in not finding that said application should be granted (VII, XXX).

14. The District Court erred in holding that in determining the validity of the order of the Commission, the concurring opinions of certain members thereof, as well as the report of the Commission as a whole, should not be considered (VIII).

15. The Court erred in not holding that the Commission was in error in requiring the Great Northern Railroad Company, the Northern Pacific Railway Company, the Chicago, Milwaukee,

St. Paul and Pacific Railway Company and Oregon-Washington Railroad & Navigation Company to cease and desist from making a separate charge for transit on certain of their lines (XXXI).

PERTINENT PROVISIONS OF THE INTERSTATE COMMERCE ACT.

"Sec. 1 (5): All charges made for any service rendered or to be rendered in the transportation of passengers or property or in the transmission of intelligence by wire or wireless as aforesaid, or in connection therewith, shall be just and reasonable, and every unjust and unreasonable charge for such service or any part thereof is prohibited and declared to be unlawful: * *"

"Sec. 3 (1) That it shall be unlawful for any common carrier subject to the provisions of this Act to make or give any undue or unreasonable preference or advantage to any particular person, company, firm, corporation, or locality, or any particular description of traffic, in any respect whatsoever, or to subject any particular person, company, firm, corporation, or locality, or any particular description of traffic, to any undue or unreasonable prejudice or disadvantage in any respect whatsoever.

"Sec. 14. (1) That whenever an investigation shall be made by said Commission, it shall be its duty to make a report in writing in respect thereto, which shall state the conclusions of the Commission, together with its decision, order, or requirement in the premises; and in case damages are awarded such report shall include the findings of fact on which the award is made.

"Sec. 15 (1) That whenever, after full hearing, upon a complaint made as provided in section 13 of this Act, or after full hearing under an order for investigation and hearing made by the

Commission on its own initiative, either in extension of any pending complaint or without any complaint whatever, the Commission shall be of opinion that any individual or joint rate, fare, or charge whatsoever demanded, charged, or collected by any common carrier or carriers subject to this Act for the transportation of persons or property or for the transmission of messages as defined in the first section of this Act, or that any individual or joint classification, regulation, or practice whatsoever of such carrier or carriers subject to the provisions of this Act, is or will be unjust or unreasonable or unjustly discriminatory or unduly preferential or prejudicial, or otherwise in violation of any of the provisions of this Act, the Commission is hereby authorized and empowered to determine and prescribe what will be the just and reasonable individual or joint rate, fare, or charge, or rates, fares, or charges, to be thereafter observed in such case, or the maximum or minimum, or maximum and minimum, to be charged (or, in the case of a through route where one of the carriers is a water line, the maximum rates, fares, and charges applicable thereto), and what individual or joint classification, regulation, or practice is or will be just, fair, and reasonable, to be thereafter followed, and to make an order that the carrier or carriers shall cease and desist from such violation to the extent to which the Commission finds that the same does or will exist, and shall not thereafter publish, demand, or collect any rate, fare, or charge for such transportation or transmission other than the rate, fare, or charge so prescribed, or in excess of the maximum or less than the minimum so prescribed, as the case may be, and shall adopt the classification and

shall conform to and observe the regulation or practice so prescribed."

"Sec. 15a (1) When used in this section the term 'rates' means rates, fares, and charges, and all classifications, regulations, and practices, relating thereto; the term 'carrier' means a carrier by railroad or partly by railroad and partly by water, within the continental United States, subject to this Act, excluding (*a*) sleeping-car companies and express companies, (*b*) street or suburban electric railways unless operated as a part of general steam railroad system of transportation, (*c*) interurban electric railways unless operated as a part of a general steam railroad system of transportation or engaged in the general transportation of freight, and (*d*) any beltline railroad, terminal switching railroad, or other terminal facility, owned exclusively and maintained, operated, and controlled by any State or political subdivision thereof; and the term 'net railway operating income' means railway operating income, including in the computation thereof debits and credits arising from equipment rents and joint facility rents.

"(2) In the exercise of its power to prescribe just and reasonable rates the Commission shall initiate, modify, establish or adjust such rates so that carriers as a whole (or as a whole in each of such rate groups or territories as the Commission may from time to time designate) will, under honest, efficient and economical management and reasonable expenditures for maintenance of way, structures and equipment, earn an aggregate annual net railway operating income equal, as nearly as may be, to a fair return upon the aggregate

value of the railway property of such carriers held for and used in the service of transportation: *Provided,* That the Commission shall have reasonable latitude to modify or adjust any particular rate which it may find to be unjust or unreasonable, and to prescribe different rates for different sections of the country.

"(3) The Commission shall from time to time determine and make public what percentage of such aggregate property value constitutes a a fair return thereon, and such percentage shall be uniform for all rate groups or territories which may be designated by the Commission. In making such determination it shall give due consideration, among other things, to the transportation needs of the country and the necessity (under honest, efficient and economical management of existing transportation facilities) of enlarging such facilities in order to provide the people of the United States with adequate transportation: *Provided,* That during the two years beginning March 1, 1920, the Commission shall take as such fair return a sum equal to 5½ per centum of such aggregate value, but may, in its discretion, add thereto a sum not exceeding one-half of one per centum of such aggregate value to make provision in whole or in part for improvements, betterments or equipment, which, according to the accounting system prescribed by the Commission, are chargeable to capital account.

"(4) For the purposes of this section, such aggregate value of the property of the carriers shall be determined by the Commission from time to time and as often as may be necessary. * *"

THE HOCH-SMITH RESOLUTION.

(Joint Resolution of January 30, 1925; U. S. Code title 49, sec. 55.)

"That it is hereby declared to be the true policy in rate making to be pursued by the Interstate Commerce Commission in adjusting freight rates, that the conditions which at any given time prevail in our several industries should be considered in so far as it is legally possible to do so, to the end that commodities may freely move.

"That the Interstate Commerce Commission is authorized and directed to make a thorough investigation of the rate structure of common carriers subject to the interstate commerce act, in order to determine to what extent and in what manner existing rates and charges may be unjust, unreasonable, unjustly discriminatory, or unduly preferential, thereby imposing undue burdens, or giving undue advantage as between the various localities and parts of the country, the various classes of traffic, and the various classes and kinds of commodities, and to make in accordance with law, such changes, adjustments, and redistribution of rates and charges as may be found necessary to correct any defects so found to exist. In making any such change, adjustment, or redistribution the Commission shall give due regard, among other factors, to the general and comparative levels in market value of the various classes and kinds of commodities as indicated over a reasonable period of years, to a natural and proper development of the country as a whole, and to the maintenance of an adequate system of transportation. In the progress of such investigation the Commission shall, from time to time, and as ex-

peditiously as possible, make such decisions and orders as it may find to be necessary or appropriate upon the record then made in order to place the rates upon designated classes of traffic upon a just and reasonable basis with relation to other rates. Such investigation shall be conducted with due regard to other investigations or proceedings affecting rate adjustments which may be pending before the Commission.

"In view of the existing depression in agriculture, the Commission is hereby directed to effect with the least practicable delay such lawful changes in the rate structure of the country as will promote the freedom of movement by common carriers of the products of agriculture affected by that depression, including livestock, at the lowest possible lawful rates compatible with the maintenance of adequate transportation service: *Provided,* That no investigation or proceeding resulting from the adoption of this resolution shall be permitted to delay the decision of cases now pending before the Commission involving rates on products of agriculture, and that such cases shall be decided in accordance with this resolution."

THE QUESTIONS PRESENTED

In making its order the Commission proceeded upon the assumption that it was empowered, under the Interstate Commerce Act, and directed by the Hoch-Smith Resolution, to prescribe "the lowest possible lawful rates" on agricultural products affected by depression (See Analysis of the Report, p. 37 *infra*). Such, as we understand it, was the position taken by counsel for the Commission in the Court below. The prescription of the lowest possible lawful rates (by whatever standard measured) necessarily presupposes the existence of other and higher rates which might have been prescribed in lieu thereof, which, if prescribed, would likewise be within the zone of reasonableness and hence reasonable and lawful.* The report of the Commission contains no finding that the carriers' rate of return exceeded the statutory standard, and it appears from the report that it was and for a long period of years had been far below the same (R. 77). The Commission found that the condition of agriculture was depressed and that among the products affected thereby were grain and grain products (R. 77). It also found that the effect upon the producer of a reduction in the rates was "more or less speculative" (R. 93). The proceeding was instituted under the Hoch-Smith Resolution and as such was a part of a general inquiry into all of the rates of the car-

*See *Grain and Grain Products*, 122 I. C. C. 235 (264) in which the "lowest possible lawful rates" are defined as being the *lowest* rates "falling within" the "flexible limits" of the Commission's "discretion"; *American Express Co.* v. *Caldwell*, 244 U. S. 617, 624; and argument of the *United States* in *Ann Arbor R. Co.* v. *U. S.*, *supra*, at p. 661; also R. 169.

riers for the purpose of bringing the rate structure into harmony with all provisions of the Interstate Commerce Act (R. 7, 15, 45-56); but the order was entered in this proceeding independently of the other parts of such general inquiry. The rates prescribed were prescribed as maximum reasonable rates (R. 273-4). The facts stated give rise to the following questions:

> (1) May the Commission, on such a state of facts, reduce existing rates (whether reasonable or unreasonable) to the level of the lowest possible lawful rates, as defined above, and thereby prevent the carriers *pro tanto* from earning, as nearly as may be, the fair rate of return contemplated by Section 15a?
>
> (2) May the lowest possible lawful rate be made the standard for the determination of maximum reasonable rates under Section 15(1)?
>
> (3) Assuming the foregoing questions to be answered in the affirmative (and it is our position both should be answered in the negative), did the resolution make it the duty of the Commission, under such state of facts, to prescribe the lowest possible lawful rates on agricultural products affected by depression?
>
> (4) May the Commission either under the Hoch-Smith Resolution or independently thereof, establish the lowest possible lawful rates, under the facts stated, solely because of an existing depression in the industry affected?
>
> (5) If the order of the Commission was made out of deference to the supposed hopes or wishes of Congress believed to be expressed by the resolution (although not amounting to a positive command), may the order be sustained?
>
> (6) Did the Commission (and the answer to this question involves of necessity a further review

of the facts) in reducing rates approved or prescribed, under the standards of the Interstate Commerce Acts, in cases decided prior to the adoption of the Hoch-Smith Resolution, apply the same standards or standards other and different therefrom?

The Commission found that, although the carriers' rate of return was far below the statutory standard (R. 77) and although the resulting loss in revenue would be substantial, the reductions made would not threaten the maintenance of an adequate system of transportation (R. 148). This was a material finding of fact, assuming (as we deny) that the Commission was either empowered or directed to prescribe the lowest possible lawful rates, under the facts stated, provided *only* that the Commission was of the opinion that the resulting reductions would not immediately threaten the maintenance of an adequate system of transportation. The finding made was based upon estimates of the probable effect of the reductions ordered and upon other estimates of the probable effect of increases said to have been granted in other cases (R. 148). None of these estimates were of record (R. 31-33, 654-656). The accuracy of both was challenged in a petition for rehearing in which the carriers offered to prove, among other things, that there were no other cases from which any substantial increase in revenues would result from rate increases authorized (R. 529, 532-534). The foregoing facts, therefore, give rise to an additional question:

(7) Is the order of the Commission void because a material finding of fact was based upon matters outside the record?

SUMMARY OF ARGUMENT.

I. The report discloses that the Commission in making its order proceeded upon the assumption that it was required by the Hoch-Smith Resolution to establish the lowest possible lawful rates on agricultural products, affected by depression (p. 37, *post*).

(1) As in *Ann Arbor R. R. Co.* v. *United States*, the reasonableness and lawfulness of the existing rates and the general level thereof had been approved by the Commission immediately prior to the adoption of the Hoch-Smith Resolution in a report which carefully considered and weighed all of the applicable standards of the Interstate Commerce Act (pp. 38-40, *post*). In marked contrast with this previous report and with all reports of the Commission in important cases, the report in the present proceeding contains neither finding nor consideration of the factors considered by the Commission in its reports in determining the reasonableness and lawfulness of rates under the standards of the Interstate Commerce Act. Chief among these factors are the relation of the rates to rates on other commodities or descriptions of service, the value of the service and the cost of the service (pp. 40-43, *post*).

(2) The absence from the report of any findings or review of facts relating to the factors customarily reviewed or found by the Commission in passing upon the reasonableness of rates under the standards of the Interstate Commerce Act coupled with the presence of certain other findings, is persuasive that the order was made either in response to a duty supposed to be created

by the Hoch-Smith Resolution to establish the lowest possible lawful rates on agricultural products affected by depression or in deference to the wishes and hopes therein expressed. The report contains no findings sufficient in themselves to support the order on any other theory (pp. 45-49, *post*). While the Commission is not required to make specific findings of fact, proper practice requires it so to do. Accordingly, the facts appearing on the report are sufficient in themselves to support the order on the theory stated but on no other is persuasive that it was based upon such conception of its powers and duties (pp. 49-52, *post*).

(3) The treatment which the report accords to the condition of agriculture on the one hand, and the carriers' rate of return and financial condition on the other, shows that the Commission was acting because of, if not wholly, under the resolution (pp. 52-60, *post*).

(4) That, in finding existing rates unreasonable to the extent that they exceeded those prescribed, the Commission applied a standard other than that commonly applied in the determination of a maximum reasonable rate, appears both from the nature of the action taken and from the report. The Commission itself had in other cases distinguished between maximum reasonable rates and the lowest possible lawful rates referred to in the resolution. Indeed, to say that a rate may at the same time be the lowest possible lawful rate and a maximum reasonable rate involves a contradiction of terms (pp. 61-73, *post*).

(5) The Commission evidenced its application of a standard other than that commonly applied in the determination of a maximum reasonable rate:

by making approximately the same percentage of reduction in rates approved or prescribed as reasonable maximum rates under Section 1 during the pendency of this proceeding (subject only to a reserved jurisdiction, to be exercised in the present proceeding, to determine whether they were also the lowest possible lawful rates, referred to in the Hoch-Smith Resolution), that is made in the general level of all the rates (pp. 62-64, *post*);

in materially reducing the rates prescribed, during the pendency of this proceeding, as maximum reasonable rates for application between southern Missouri, Arkansas, Louisiana and Texas, *i.e.*, throughout the entire Southwest (pp. 64-65, *post*);

by reducing the proportional rates out of primary markets (pp. 65-66, *post*);

by reducing an important proportional rate previously prescribed by the Commission as a minimum rate (p. 67, *post*);

by reducing the proportional rate from St. Louis to New Orleans which the carriers, during the pendency of this proceeding, were authorized to establish and at the same time to charge higher rates at intermediate points (p. 67, *post*); and

by the action taken in respect of readjustments made to remove discrimination (pp. 68-70, *post*).

The only permissible conclusion is that these reductions were made as a part of the purpose, disclosed by the report itself, to prescribe the lowest possible lawful rates on agricultural products and not for the purpose of establishing reasonable rates as judged by the customary standards of the act.

(6) The foregoing conclusions are supported by the concurring opinion of Commissioner Eastman which contains the only extended consideration of the applicable law to be found in the report (pp. 70-73, *post*). Although seven other commissioners filed concurring opinions, none dissented from the views expressed by Mr. Eastman (p. 72, *post*).

II. It was the duty of the Commission to consider Sec. 15a (p. 74, *post*).

(*a*) Section 15a must be taken into consideration by the Commission in a case of the character of the Grain case (quite apart from the fact that it is a part of a general rate structure investigation), as the Grain case embraces the general level of all the rates of all the carriers on a major description of traffic in two of the rate groups established by the Commission for the purpose of administering Section 15a (pp. 74-70, *post*).

(*b*) Assuming for the purposes of the argument that the Commission need give consideration to Section 15a only in a case dealing with the general level of all of the rates (and not in a case dealing with the general level of the grain rates), this proceeding is precisely that case, as it is a general investigation into the entire rate struc-

ture of the country instituted pursuant to the second paragraph of the Hoch-Smith Resolution, the Grain case being merely a part thereof so designated by the Commission for purposes of convenience (pp. 79-80, *post*).

(*c*) Since the Commission did give consideration to Section 15a, if it placed a wrong interpretation thereon, its order is void (p. 81, *post*).

III. The effect of the order is materially to reduce the general level of the rates on a major description of traffic without any finding that the carriers' rate of return was, or in the near future, would be in excess of that contemplated by Section 15a, but, on the contrary, at a time when such rate of return was materially below the statutory requirement, and without any finding, or basis for finding, that such reduction would result in increased revenues through stimulating an increased volume of traffic (pp. 82-86, *post*).

IV. The Commission may not establish the lowest possible lawful rates at a time when the carriers' rate of return is below the statutory standard. In so doing it not only proceeded upon a misconception of its powers but failed to discharge the duty imposed by Section 15a (pp. 87-109, *post*).

(1) Sections 1, 15 and 15a must be read together. Section 15a qualifies and controls the powers, which may be exercised under Sections 1 and 15 in any case in which the Commission is required to give the former consideration (pp. 87-88, *post*).

(*a*) Prior to the enactment of Sec. 15a the carriers as a whole were permitted to earn a fair return out of the aggregate of the separately established rates, if able to do so.

(*b*) The purpose and object of Sec. 15a was to insure the receipt of an aggregate revenue by the carriers as a whole sufficient to support an adequate system of transportation.

(*c*) Congress itself fixed the standard by which such adequacy is to be determined, *viz.*, by the application to the revenues of the carriers as a whole of Amendments V and XIV of the Constitution, limiting the right of public authority to establish rates for a local single product public utility and therefore applicable to individual carriers only.

(*d*) For this purpose and as the means of its accomplishment Congress imposed upon the Commission an affirmative duty so to adjust rates as to produce the desired result, as nearly as may be, through the exercise of the powers theretofore conferred by Sections 1 and 15 (pp. 88-93, *post*).

(2) The Commission may not consistently with the requirements of Sec. 15a prescribe the lowest possible lawful rates in the absence of a finding that the group rate of return received by the carriers exceeds the statutory standard or at a time when it is materially below the same, where the effect of such action is to deprive the carriers *pro tanto* from earning such rate of return (pp. 94-100, *post*).

(2*a*) The prescription of the lowest possible lawful rates necessarily presupposes the existence of other possible rates which, if prescribed would be within the zone of reasonableness and hence reasonable and lawful under Section 1 (pp. 94-96, *post*).

(2*b*) The prescription of such rates at such a time results in the making of rates lower than are necessary to meet the requirements of Sec. 1 and *pro tanto* prevents the carriers from receiving as nearly as may be a fair return (pp. 96-97, *post*).

That the Commission so proceeded affords the only reasonable explanation of the treatment accorded to the carriers successive efforts to secure a postponement of the order and a rehearing (pp. 122-124, *post*).

(2*c*) The fundamental error of the Commission lay in its failure to recognize that in a proceeding in which the Commission was required to consider Section 15a that section required the Commission to exercise the powers theretofore conferred by Sections 1 and 15, to determine the points in the zone of reasonableness at which rates should be established, so as to produce, out of the aggregate of all such rates, a fair rate of return, as nearly as may be. Otherwise, that section is rendered meaningless (pp. 97-100, *post*).

(3) Recapitulation of the true import of Section 15a and of its relation to the powers of the Commission under other sections of the Act (pp. 100-102, *post*).

It follows from the foregoing:

(1) Sec. 15a is not a mere permission to earn out of the aggregate of rates established a fair

return, if possible. It imposes upon the Commission the positive duty to establish such rates as to achieve such result as nearly as may be.

(2) The rate structure and the level of the rates to be established are to be determined by reference to the required rate of return, not by conclusions of the Commission independently thereof as to what is good for the country or the carriers, or what kind of a structure, in its opinion, is necessary for the maintenance of an adequate system of transportation.

(3) Sec. 15a becomes a part of the standards of Sec. 1, which must be read and applied with respect thereto. Sec. 15a therefore limits the Commission in the exercise of the powers theretofore conferred by Sec. 1 to the extent necessary for the achievement of the purpose of the former.

(4) Sec. 15a does not prohibit the Commission from reducing particular rates or classes of rates when clearly unreasonable, *i.e.*, above the upper boundary of the zone of reasonableness. It does forbid the Commission, (in a case where the existing rates are above the upper boundary of the zone of reasonableness, just as much as in a case where the existing rates are within the zone of reasonableness), either to fix *all* rates at the lowest possible lawful level, thus preventing *all* possibility of achieving the statutory rate of return, or to fix the rates of any major description of traffic at the lowest possible lawful level, where

the effect is *pro tanto* to prevent the receipt of such return. The Commission may not, therefore, establish the lowest possible lawful rates on a substantial volume of traffic, where the carriers' rate of return is at the time inadequate, or in the absence of a specific finding that it exceeds or in the near future will exceed the statutory rate.

(5) The Commission may not establish the lowest possible lawful rates on a substantial volume of traffic upon the theory that such reductions will increase revenues by increasing movement, without a specific finding to that effect.

(4) The rates prescribed were prescribed as the lowest possible lawful rates (pp. 103-105, *post*).

(5) The action of the Commission may not be sustained by a reference to the phrase "as nearly as may be" which Sec. 15a contains (p. 105, *post*).

(6) The order of the Commission would have been void, if it had contained, which it did not, a specific finding that the rates were unfairly related to the rates on other traffic (pp. 106-109, *post*).

V. The Commission's misconstruction of Section 15a and of the effect of the resolution upon its duties thereunder appears on the face of the report (pp. 110-124, *post*).

(1) The Commission either (*a*) erroneously construed Section 15a as being merely permissive and as

permitting the Commission to substitute a standard of its own for the statutory standard established thereby, or (*b*) construed the resolution as discharging it in the proceeding before it from the affirmative duty to imposed generally by Section 15a (pp. 110-117, *post*).

(2) The Commission, if it did not wholly misconceive its duties under Sec. 15a, proceeded upon the erroneous assumption that, because of the resolution, it was directed to establish the lowest possible lawful rates in this proceeding, although at or after the conclusion of the general investigation, of which it was a part, it might be required to advance the general level of all rates, including grain rates, in order to discharge the duty imposed by Sec. 15a (pp. 118-122, *post*).

VI. The Commission exceeded the power conferred by Sections 1 and 15 and applied a standard other than and different from the standards of said sections (pp. 125-137, *post*).

If it be true that Section 15a qualifies Section 1, then it is clear that in establishing the lowest possible lawful rates on grain and grain products in the absence of a finding that the carriers' rate of return exceeded the statutory standard and at a time when, on the contrary, it was materially less, the Commission exceeded the authority conferred by Section 1, as well as acted in disregard of Section 15a.

There are other reasons why in so doing it exceeded the power conferred by Sections 1 and 15.

(1) The carriers were ordered not to charge rates to exceed those prescribed by the Commission. The rates

were therefore prescribed as maximum reasonable rates, not as minimum rates (pp. 125-126, *post*).

(2) The exercise of the power to prescribe a minimum rate is the exercise of the power to prescribe the lowest possible lawful rate, *i.e.*, one below which the carrier may not lawfully go. It may not at the same time be the standard of a maximum rate (pp. 126-129, *post*).

(3) The lowest possible lawful rate may not be used as the measure for the determination of maximum reasonable rates (pp. 129-132, *post*).

(3*a*) Counsel for the Commission in the Court below conceded that it could not be made the measure of determining the lawfulness of existing rates (pp. 129-130, *post*).

(3*b*) Neither it may be made the measure for determining the maximum rates to be established in lieu of those found to exceed such maximum (pp. 130-132, *post*).

(4) It appears from the report as a whole, as well as from the action taken, that the reasonableness and lawfulness of existing rates, as well as those prescribed for the future, were measured by comparison with the lowest possible lawful rates, referred to in the resolution. In so doing the Commission applied a standard, the use of which was erroneously supposed by it to be required by the resolution, and which but for the resolution it would not have been required to employ (pp. 132-136, *post*).

VII. Assuming that the Commission may, in a proper case, establish the lowest possible lawful rates, irrespective of the carriers' rate of return, this is not such a case (pp. 137-144, *post*).

(1) The Commission is not empowered by the Act to establish the lowest possible lawful rates, because of a depression in the industry affected, and certainly not at a time when the carriers' rate of return is far below the statutory standard (pp. 137-139, *post*).

(2) The resolution did not make it the duty of the Commission so to do. Nor may the order be sustained, if made out of deference to the supposed wishes of Congress, expressed therein, but not amounting to a direction (pp. 140-141, *post*).

(3) The Commission's error arose from its failure to perceive the conflict between the conception of its powers and duties, under which it acted, and the decision in *Ann Arbor R. Co.* v. *United States,* as evidenced by the interpretation placed upon that decision in the concurring opinion of Commissioner Eastman, said by him not to be in conflict therewith, and which contains the only extended review of the applicable law to be found in the report (pp. 141-144, *post*).

VIII. The order of the Commission cannot be sustained by reason of the fact that the Commission at the same time readjusted many inequalities in rates, thereby removing discrimination (pp. 145-146, *post*).

IX. The ultimate finding which the report contains that the present rates are unreasonable to the extent that

they exceed those prescribed is not in itself sufficient to support the order (pp. 146-148, *post*).

X. The Commission considered matters outside of the record. For this reason alone, its order is void and its enforcement should be enjoined (pp. 149-153, *post*).

XI. The action of the Commission in overruling the carriers' petitions for rehearing and thus requiring the order to become effective and in failing to discharge the affirmative duty imposed by Section 15a to protect the carriers' revenues is so arbitrary and unreasonable as to render its order void and as to entitle the petitioners to enjoin its enforcement (pp. 154-160, *post*).

(1) The carriers submitted in petitions for rehearing and offered to prove facts showing a fundamental change for the worse in the condition of their revenues and the relation thereto of the grain rates, in the years following the close of the record herein and prior to the effective date of the order herein. These petitions were summarily denied by the Commission, which thereby put the order into effect on a record closed nearly three years before (pp. 154-157, *post*).

(2) In the main report the Commission had based its decision in part upon an anticipation that its failure to provide adequate revenues would prompt the carriers to bring future proceedings to protect those revenues, and to that extent based its decision in part upon a mere chance that it would prove right instead of basing it exclusively (as was its duty) upon the evidence before it (pp. 157-160, *post*).

ARGUMENT

I

THE REPORT DISCLOSES THAT THE COMMISSION IN MAKING ITS ORDER PROCEEDED UPON THE ASSUMPTION THAT IT WAS REQUIRED BY THE HOCH-SMITH RESOLUTION TO ESTABLISH THE LOWEST POSSIBLE LAWFUL RATES ON AGRICULTURAL PRODUCTS, AFFECTED BY DEPRESSION.

If the Commission was possessed of such power and was directed by the Hoch-Smith Resolution to exercise it in respect of such products, but two issues were presented to the Commission for determination:

(1) Was the condition of agriculture depressed and were grain and grain products among the products affected thereby?

(2) What were the lowest possible lawful rates capable of being prescribed?

That the Commission proceeded upon such conception of its powers and duties and hence of the issues before it is shown (1) by the emphasis placed upon the condition of agriculture as compared with all other questions, (2) by the interpretation placed upon the relation of Sec. 15a to the case and the treatment accorded such section in the report, (3) by the report as a whole, including the concurring opinions, (4) by the absence from the report of any consideration of the factors customarily considered in determining the reason-

ableness of rates and which the Commission, prior to the adoption of the resolution, had considered and applied to other cases dealing with the same subject matter, and (5) by the nature and extent of the reductions made in rates so recently approved or prescribed as maximum reasonable rates, including rates so prescribed after the adoption of the resolution.

1. As in *Ann Arbor R. Co. v. United States*, the reasonableness and lawfulness of the existing rates and the general level thereof had been approved by the Commission immediately prior to the adoption of the Hoch-Smith Resolution in a report which carefully considered and weighed all of the applicable standards of the Interstate Commerce Act.

In *California Growers & Shippers Protective League v. S. P. Company*, 100 I. C. C. 79, the Commission approved the then existing rates on deciduous fruits from California to Eastern destinations after careful consideration of all of the factors entering into the determination of the reasonableness and lawfulness of such rates under the Interstate Commerce Act. Subsequently, in *California Growers & Shippers Protective League* v. *S. P. Company*, 129 I. C. C. 25, 132 I. C. C. 582, instituted after the adoption of the Hoch-Smith Resolution, the Commission required substantial reductions to be made in the rates previously approved, primarily because of the Resolution and the depression in the industry. It was the order in this case that was set aside by this Court in *Ann Arbor R. Co.* v. *United States.*

The general level of the grain rates reduced in the present proceeding had been but recently approved in

Kansas Public Utilities Commission v. *A. T. & S. F. Ry. Co.*, 83 I. C. C. 105 (R. 327), and in *Rates and Charges on Grain and Grain Products*, 91 I. C. C. 105 (R. 341).

The second of these cases was decided July 10, 1924 (R. 341), less than seven months prior to the adoption of the Hoch-Smith Resolution, under which the present proceedings were instituted. The report in that case carefully reviewed and weighed the factors commonly entering into the determination of the reasonableness and lawfulness of rates under the Interstate Commerce Act (R. 359 *et seq.*). It also held that it was required to consider and give effect to the requirements of Sec. 15a, since the effect of any reduction in the rates upon the carriers' rate of return would be direct and substantial (R. 400). It held, as it had in the previous case, that the rates on grain and grain products were not unfairly related to the rates on other commodities, cast no undue burden thereon, and could not be reduced consistently with the requirements of Sec. 15a (R. 399-400). It also gave consideration to the condition of agriculture, which it found to be depressed, and to the weight which should be given to such depression. The existence of such depression, it rightly held (*Ann Arbor R. Co.* v. *United States, supra*) could not in itself be made the basis of a reduction in rates, but could be given only such weight as it was entitled to as affecting the value of the service, one of the elements considered and discussed in the report (R. 379). It also found that the benefit to the farmer, if any, resulting from a substantial reduction in rates would be exceedingly slight, while the effect upon the carriers, whose

rate of return was already far below that contemplated by Sec. 15a, would be immediate and severe (R. 387, 400).

2. In marked contrast with its previous reports and with all reports of the Commission in important cases, the report in the present proceeding contains neither finding nor consideration of the factors commonly considered by the Commission in its reports in determining the reasonableness and lawfulness of rates under the standards of the Interstate Commerce Act.

Chief among those factors are the relation of the rates to rates on other commodities or on descriptions of service, the value of the service and the cost of the service.*

(A) RELATION OF THE GRAIN RATES TO THE RATES ON OTHER DESCRIPTIONS OF TRAFFIC.

The report in *Rates and Charges on Grain and Grain Products* (R. 341) devotes seven pages to a consideration of this question, and reviews statistics relating to sixty-nine different commodity groups of traffic, discussing the relative contribution of grain and grain products and of such other commodity groups to carload revenue (per car and per car-mile and per ton-mile), to total loaded car-miles and to ton-miles, considers the average relative

*See *Dayton-Goose Creek Ry. Co.* v. *U. S.*, 263 U. S. 456, 478, in which these factors are referred to as those which may be taken into account in passing upon the reasonableness of particular rates in cases where the Commission is not required to give consideration as well to the requirements of Sec. 15a.

haul per car, and per car-mile, goes into detail on the relationship of grain and grain products as a whole to hay, to other products of agriculture, to animals and their products, to the products of mines, of forests, of manufactures and miscellaneous, reviews evidence as to six particular Class I carriers, and considers the effect of Canadian competition and various other factors (R. 359-365). After this comprehensive study, the following carefully framed specific findings were made. (R.399):

> "(*a*) That rates on grain, grain products, and hay, generally speaking, are now on a somewhat lower basis compared with pre-war freight rates than are the carload rates on other traffic.
>
> "(*b*) That the earnings per car, per car-mile, and per ton-mile on grain and grain products, compared with other classes of traffic and with all carload traffic, do not show that grain and its products are now contributing more than their fair share to the revenues of the carriers in this group, considering the value of the traffic, the average hauls, the relative services performed, and the ratio of revenue produced by grain and grain products to total carload revenue compared with former years."

Contrast this with the report in the present case. There is not a single finding on the relation of the grain rates to the rates on other traffic; there is no recital of any facts bearing thereon and no discussion of the question whatsoever. At the outset of the report, the question is presented "whether, under present conditions, the rates on grain and grain products * * * are properly related to each other and to the rates on other traffic", and the

Commission points out that "the answer must take into account * * * comparisons of distance, transportation conditions and ton-mile and car-mile earnings on grain and other commodities" (R. 77). Yet, not once in the remainder of the report is there a comparison of distance or of transportation conditions or of ton-mile earnings or of car-mile earnings or of any other relevant data.

The question is presented, but the answer is missing and any consideration of the question is missing.

This contrast between the Commission's attitude in the two cases, dealing as they did with precisely the same subject-matter, is eloquent of the misconception that had come into the minds of the Commissioners, between the decision in the earlier case and the decision in the later case, as to their powers and duties.

(B) THE VALUE OF THE SERVICE.

This factor also is considered at length in the report in *Rates and Charges on Grain and Grain Products* (R. 379-381). There is a comparison of wheat and corn with salt, coal, cement, brick and other heavy-loading commodities to determine their relative purchasing power from the standpoint of "element of value". There is a comparison in detail of freight rates per ton and value of commodity per ton for the heavy-loading commodities over seven different distances ranging from 108 miles to 880 miles. The shifting prices for grain and its products are considered, and other market considerations are referred to. The result was a specific finding.

> "(*e*) That the present adjustment of rates on grain and its products from the 'element of

value' standpoint, compared with the other heavy-loading commodities, moving in volume, pointed to by complainants, as profiting by the disturbance in relative values, is not unfavorable to grain and grain products" (R. 399).

We venture to say that the report in the present case may be searched in vain for any reference to a consideration of this factor.

(C) THE COST OF THE SERVICE.

We have seen that the Commission gave no consideration whatsoever to the elements of the relationship of the grain rates to other rates, and of the value of the services rendered in hauling the grain. To the third factor customarily considered in passing upon the reasonableness of rates,—the factor of the cost of the service—the Commission did give consideration. But the nature of the consideration given is, if possible, more significant of the Commission's error than would be a complete absence of consideration. The Commission (R. 79-81) considers various analyses dealing with costs of transporting wheat. But after considering them, the Commission reaches no conclusion and makes no finding. Indeed, it is apparent from its discussion of this subject that this question was involved in such uncertainty and doubt as to admit of no conclusion or finding in respect thereof (see paragraph beginning at the bottom of R. 80). The Commission evidently considered the subject in the off-hand manner in which any subject would be considered by a tribunal which did not feel that the subject was necessary to a decision.

3. The absence from the report of any findings or review of facts relating to the factors customarily reviewed or found by the Commission in passing upon the reasonableness of rates under the standards of the Interstate Commerce Act, coupled with the presence of certain other findings, are persuasive that the order was made either in response to a duty supposed to have been created by the Hoch-Smith Resolution to establish the lowest possible lawful rates on agricultural products affected by depression or in deference to the wishes and hopes therein expressed.

The report thus contains no facts or findings of fact, in themselves capable of supporting the order, under the standards of the Interstate Commerce Act, save only the ultimate conclusion, expressed in the words of the statute, that all existing rates are unreasonable to the extent that they exceed those prescribed (R. 111). But such a conclusion, so expressed, may be examined by the Court in the light of the facts specifically found, the report as a whole (including the separate expressions of opinion by individual Commissioners) and of all other pertinent facts for the purpose of determining whether such ultimate conclusion is, or is not, based upon a misconception of the Commission's powers and duties, a misinterpretation of the statute or any other error of law. *Southern Pacific Company* v. *Interstate Commerce Commission*, 219 U. S. 433, 443; *St. Louis & O'Fallon Ry. Co.* v. *United States*, 279 U. S. 461, 487; *Ann Arbor R. Co.* v. *U. S., supra; Florida* v. *United States*, 282 U. S. 194.

(A) THE REPORT CONTAINS NO FINDINGS SUFFICIENT IN THEMSELVES TO SUPPORT THE ORDER ON ANY OTHER THEORY.

The only facts appearing in the report, which have any bearing upon the action of the Commission in respect of the general level of the rates, as distinguished from its action in respect of the relation of the rates on grain and grain products to each other, are as follows:

(*a*) Relating to the Conditions of Agriculture.

(1) That the condition of agriculture, although improved, is still depressed, and that among the agricultural products affected by depression are grain and grain products (R. 76).

(2) That the effect of a reduction in the rates thereon on the producer is more or less speculative (R. 93).

(*b*) Relating to the Revenues of Carriers.

(3) That 12% of the revenues of the carriers in the Western District at current rates is derived from grain and grain products (R. 78).

(4) That the carriers' rate of return was and for a period of more than eight years preceding the entry of the report had been far below the statutory standard (R. 79).

(5) That the effect of the order will be to reduce substantially the revenues of the carriers (R. 148).

(6) That notwithstanding the inadequacy of the carriers' rate of return, the Commission is of the opinion that the readjustment required will not threaten the maintenance of an adequate system of transportation (R. 148).

The third paragraph of the Hoch-Smith Resolution provides:

> "In view of the existing depression in agriculture, the Commission is hereby directed to effect with the least practicable delay such lawful changes in the rate structure of the country as will promote the freedom of movement by common carriers of the products of agriculture affected by that depression, including livestock, at the lowest possible lawful rates compatible with the maintenance of adequate transportation service. * * * " (R. 17).

The rates prescribed were characterized by the Commissioner in charge of the case (Commissioner Meyer) as the lowest rates which could be lawfully prescribed (R. 150). Commissioner Eastman in a concurring opinion, which contains the only extended discussion of the applicable law, stated that the Commission was required by the resolution to establish the lowest possible lawful rates on agricultural products (R. 718, 722). The lowest possible lawful rate as defined in the argument made to this Court in *Ann Arbor R. Co.* v. *United States* is a rate which, although within the zone of reasonableness, is lower than might be made and still be within the zone, there being at the same time, as was said in the argument, a "highest possible lawful rate"

and "lowest possible lawful rate", each being in itself reasonable and lawful because within the zone of reasonableness. The existence of such a zone was recognized by this Court in *American Express* v. *Caldwell*, 244 U. S. 617, 624.* The phrase "the lowest possible lawful rate" owes its origin to the third paragraph of the Hoch-Smith Resolution.

The general level of the rates twice approved prior to the adoption of the Hoch-Smith Resolution (R. 17-18, 327, 341) is reduced 13% (R. 14, 636). In addition, the specific rates themselves, as appears from the report as well as from the petition, had been largely prescribed or approved by the Commission in previous cases (R. 110). Among the most important of these were cases in which the Commission approved or prescribed maximum reasonable rates in proceedings contemporaneously conducted but decided prior to the decision of this case (R. 23, 29). Among the cases so decided during the pendency of this proceeding were two in which the rates were approved or prescribed as maximum reasonable rates, subject only to a reserved jurisdiction, to be exercised in the present proceeding, to determine whether they were also the lowest possible lawful rates referred to in the Hoch-Smith Resolution (R. 23). The reduction made in such rates, presumably under the jurisdiction reserved, is approximately the same as in the general level of all rates (R. 250-1, 247, 272). The extent by which the new rates are less than the old, as well as the characterization of the former as "the lowest possible lawful rates" leaves no room for doubt that they were so prescribed. (*Infra*, pp. ~~43-55~~ 62-67).

*See also *Grain and Grain Products*, 122 I. C. C. 235 (264).

In its report in *California Growers & Shippers Protective League* v. *S. P. Company, supra,* and in the argument made in support of the order therein in *Ann Arbor R. Co.* v. *United States, supra,* it was asserted that the Commission was empowered by the Interstate Commerce Act and directed by the Hoch-Smith Resolution to prescribe the lowest possible lawful rates on agricultural products affected by depression, notwithstanding the fact that the carriers had not made the fair return contemplated by Section 15a, provided only that it was satisfied that the resulting reductions would not threaten the maintenance of an adequate system of transportation. The same power was asserted or exercised in *Muller & Co.* v. *Pere Marquette R. Co.,* 151 I. C. C. 787 and *South Carolina Produce Association* v. *Aberdeen R. Co.,* 155 I.C.C. 5, 27. That the Commission possesses such power was asserted in the Court below. The duty to exercise this power, because of the resolution, was asserted in *Grain and Grain Products,* 122 I. C. C. 235 as well as in the other cases cited.

A large part of the record was devoted to the condition of agriculture. This is the only part of the record reviewed at length in the report. It is summarized in an appendix of 37 pages (Appendix C, R. 206-243). Upon the basis thereof the Commission found that the condition of agriculture, although somewhat improved, is still depressed, and that grain and grain products are among the agricultural products affected by such depression (R. 77). Moreover, although the report found that the condition of agriculture was depressed, it also found that the effect upon the producer would be more or less

speculative (R. 93). It did not find and could not have found (*Infra*, p. 82 *et seq.*) that grain was not moving freely under the existing rates, or that reduction therein would increase the movements and hence the revenues of the carriers.

Whether the Commission possesses the power thus asserted, and whether the resolution directs it to exercise such power in respect of agricultural products, affected by depression, and because of such depression, are two of the principal questions of law in the case. It is our contention that, whether the Commission may exercise such power under any circumstances under Sections 1 and 15, it may not do so consistently with the duty, imposed by Section 15a, so to exercise the powers conferred by Sections 1 and 15 as to produce, as nearly as may be, a fair rate of return, at a time when such rate of return is far below the statutory standard. It is also our contention that, whether the Commission possesses and may exercise such power at that or any other time, the resolution does not make it its duty so to do because of the existence of a depression in agriculture. If, however, such were the powers and duties of the Commission, then the findings made fully support the order for the Commission found the existence of a depression in agriculture and that grain and grain products were among the products affected thereby. Otherwise the facts appearing on the report are insufficient to support the order.

(B) WHILE THE COMMISSION IS NOT REQUIRED TO MAKE SPECIFIC FINDINGS OF FACT, PROPER PRACTICE REQUIRES IT SO TO DO. THAT THE FACTS APPEARING ON THE

REPORT ARE SUFFICIENT IN THEMSELVES TO SUPPORT THE ORDER ON THE THEORY STATED BUT ON NO OTHER IS PERSUASIVE THAT IT WAS BASED UPON SUCH CONCEPTION OF ITS POWERS AND DUTIES.

While the Commission is not required by law to make specific findings of fact, proper practice requires it so to do. *Beaumont, Sour Lake & Western Ry. Co.*, 282 U. S. 74, 86.

In this case the report itself contains findings or statements of fact sufficient to support the order upon the theory stated, but in themselves wholly insufficient to support it on any other. Moreover, although the duty to make specific findings was removed by the *Hepburn* Act, Section 14(1), still makes it the duty of the Commission to make a report in writing which shall state the conclusions of the Commission, together with its decision, order or requirement in the premises. The object of this would appear to be to require the Commission to set forth in its report sufficient of its conclusions to indicate the basis of its action. A mere recital that the investigation involved the rates from A to B, and that the Commission found such rates to be unreasonable to the extent indicated would clearly not be such a report as the statute contemplates. The orders of the Commission are subject to judicial review. Manifestly, the courts should be relieved of the labor of examining all of the evidence before the Commission for the purpose of ascertaining the basis of its action and particularly so in a case such as this, where the record consisted of 53,000 pages of testimony and over 2,000 exhibits (R. 147).

The report on its face, therefore, gives rise to something more than a presumption that the action of the Commission was predicated upon that conception of its powers and duties under which, if correct, the facts appearing in the report were sufficient to sustain the validity of the order, rather than upon some other theory under which the facts appearing in the report would be insufficient to support it.

In *Florida v. United States*, 282 U. S. 194, the Court set aside an order of the Commission because of the absence of basic findings sufficient to support it. The report in that case did contain certain basic or evidentiary findings, in addition to the ultimate finding expressed in the words of the statute, but these findings the Court held were insufficient to support either the Commission's ultimate conclusion or the order based thereon. Under these circumstances, the Court said it was not called upon "to examine the evidence in order to resolve opposing contentions as to what it shows or to spell out and state such conclusions of fact as it may permit." It is true that that case related to intrastate rates, and in citing it we are not to be understood as suggesting that in cases dealing with interstate rates the Commission is required to make specific or basic findings. It would seem, however, that where, as in this case, the report contains findings or statements of fact sufficient to support the order on one theory only, the parties and the Court are entitled to assume that the order is based upon such theory and that the Court is not required, any more than in the *Florida* case, to examine the record to see whether it contains facts sufficient to have warranted the making

of other findings which, if present, would have supported the order on some other theory.

Indeed, it would appear that if the Court should pursue such course, it would run the risk of making findings, other than those which the Commission would have made, if it had felt called upon to make any, and would thus substitute its judgment for that of the Commission in an administrative matter. The foregoing facts and considerations are persuasive:

(*a*) That the order was based upon the theory that the Commission had the power asserted, and

(*b*) That the resolution made it its duty to exercise such power, if it found that grain and grain products were affected by depression.

4. The treatment which the report accords to the condition of agriculture on the one hand and the carriers' rate of return and financial condition on the other, shows that the Commission was acting because of, if not wholly under, the resolution.

(A) THE CONDITION OF AGRICULTURE.

As previously stated, the evidence relating to the condition of agriculture, to which a large part of the record was devoted, is the only part of the evidence reviewed by the Commission at length. This is done in an appendix (Appendix C, R. 206-243). From it the Commission concludes that the condition of agriculture, while improved since its last decision, was still depressed,

and that grain and grain products were among the agricultural products affected by depression (R. 76-7). This appendix is made a part of the report. It is printed in small type. If printed in the same type used in the main report, it would easily equal, if not exceed the main report in length.*

We are not suggesting that the validity of the order be predicated upon the number of pages devoted to one subject or another. The length of the appendix, together with the thorough-going review of the condition of agriculture which it contains certainly warrants the conclusion, however, that it was the subject uppermost in the mind of the Commission, particularly when contrasted with the few lines accorded in the report to the condition of the railroads and with the absence therefrom of any consideration of the factors customarily entering into the determination of the reasonableness of rates under the Interstate Commerce Act. Certainly the Commission regarded it as one of the major issues. If, as asserted in previous decisions of the Commission, and in the concurring opinion of Commissioner Eastman (R. 168) in this case, the resolution *required* the Commission to establish the lowest possible lawful rates on agricultural products affected by depression, the condition of agriculture presented not merely a major issue but the principal issue.

*The main body of the report is given over largely to a description of the grain traffic, the manner in which grain is marketed, the general characteristics of the present rate structure (which the order preserves without substantial change), certain incidents thereto such as "transit", the relation between rates on the several kinds of grain and between the rates on grain and grain products, and an extended description of the effect of the readjustment required.

That the Commission so regarded it is, we believe, in addition to being established by the importance attached to it in the report and in the concurring opinions of various members of the Commission, made plain by the contrast between the consideration given thereto and the treatment which the report accords to the carriers' rate of return and financial condition and by the conclusions reached from a consideration of both.

(B). THE CONDITION OF THE CARRIERS.

As distinguished from the lengthy Appendix, dealing with the condition of agriculture, the report devotes a single page to the carriers' rate of return and financial condition (R. 77-78).

It appears therefrom that the carriers' rate of return was and for the preceding eight years had been far below the statutory rate of return. It moreover appears that their rate of return and financial condition had not improved since the prior report in *Rates and Charges on Grain and Grain Products, supra.* The conclusions reached were based largely on the operations for the year 1923, in which the carriers' rate of return was 3.96. In the year immediately preceding the close of the record in the present proceeding (1927, R. 8) it was 3.92. The report discloses a slight improvement in 1928, and an average rate of return for the eight year period of 3.9. The Commission was, of course, fully aware of the depression existing in 1930, when the order was entered, and of the adverse effect of the same upon the carriers, although probably not the exact extent thereof. The precise extent thereof, however, was called to the atten-

tion of the Commission by the carriers' petition for rehearing, together with the continuing decline in revenue in so much of the year 1931 as had passed. These petitions for rehearing were filed before the order became effective (R. 280, 507).

The Commission in its report, after stating that it must take into account

> "whether the general level of rates on all traffic as a whole is sufficiently high to accord to the carriers the rate of return contemplated by law, including Section 15a of the interstate commerce act"

then proceeds to construe said section as follows:

> "which we construe to permit, but not to guarantee, the carriers to earn 5.75 per cent on the fair value of the property devoted to the transportation service."

Section 15a, while not a guaranty, is, of course, more than a mere permission to the carriers to earn a fair return out of separately established rates, if they can get it. This permissive right existed prior to the enactment of Sec. 15a.

At the conclusion of its report under the heading "General Comment", the Commission says:

> "The action here taken represents the fullest possible response to all the mandates of the law affecting, among other things, the important subjects of levels and relations of rates, the natural and proper development of the country as a whole, and the maintenance of an adequate system of

transportation. The future volume of movement of wheat and other grains between specific points can not be accurately known. It follows that the revenue effects of the increases and decreases which will follow the effectiveness of our action herein cannot be precisely stated. We have made many different checks and estimates. *While the reductions far exceed the increases, and the corresponding revenue effects will be substantial,* the full effect upon revenues cannot be adequately foretold, in view of the limitations upon transit, the elimination of transit balances outbound from primary markets, and the greater safeguarding of revenues from wasteful competition that should follow the reduced level of rates. *We are satisfied that the readjustment will not threaten the maintenance of an adequate system of transportation*" (R. 147). (Italics ours.)

Here we have the Commission's own carefully phrased description of the mandates of the law, to each of which it is said the order makes the fullest possible response. Among the mandates to which the order is said to be fully responsive is that requiring "the maintenance of an adequate transportation system". The order is said to be fully responsive to that mandate because, although the revenue effects will be substantial, the Commission is "satisfied that the readjustment will not threaten the maintenance of an adequate system of transportation". In so stating the Commission could not have intended to say that the action taken was fully responsive to the mandate imposed by Sec. 15a, adopted by Congress as the means by which the maintenance of an adequate system of transportation was to be insured, since it ap-

peared from the report that the carrier's rate of return was already far below the standard of that section.

Language similar to that contained in the foregoing excerpt appears in the Commission's report in *California Growers' & Shippers' Protective League* v. *S. P. Co.*, 129 I. C. C. 25, 55. In that report the Commission said:

> "* * * While all the defendants who handle the bulk of the deciduous-fruit traffic have not as yet made the fair return, their present financial condition is relatively strong. It seems clear that the reduction requested, if granted, would not affect the maintenance of adequate transportation service."

In setting aside the order of the Commission this Court said (281 U. S. at pp. 667-668):

> "The third paragraph was construed by the commission as making a change 'in the basic law,' as placing agricultural products in a 'most favored' class, and as justifying a reduction in the rates on deciduous fruits moving from California to eastern points, nothwithstanding most of the carriers 'have not as yet made the fair return' *for which § 15a of the Interstate Commerce Act makes provision as a means of securing the maintenance of an adequate transportation system.*" (Italics ours.)

In both cases, therefore, the Commission was proceeding upon the theory that it was directed by the resolution to establish the lowest possible lawful rates on agricultural products affected by depression and because of such depression, irrespective of the existing inadequacy of return, provided only that it was of the opinion

that the immediate effects of such action would not be to threaten the maintenance of an adequate system of transportation.

This conclusion, appearing on the face of the report, is supported by the concurring opinions.

Commissioner Eastman was of the opinion that the resolution imposed such a duty to be performed "in the present proceeding" (R. 168, R. 172). At the same time he recognized the Commission's duty under Sec. 15a to see to it that the "general body of rates" was "sufficient * * * to produce * * * the fair return stipulated by that section" (R. 172) and that the performance of this duty might require a subsequent increase in the rates now made. Otherwise stated, according to this view, the Commission was discharged in the present proceeding from giving effect to the requirements of Sec. 15a and required to readjust the rates on agricultural products affected by depression without regard thereto.

Commissioner Lewis expressed the opinion "that the level herein prescribed is probably too low to be permanent" (R. 186).

Commissioner Woodlock was gravely apprehensive of the revenue effects of the order and expressed the opinion that if the rates prescribed were "to remain long in effect * * * they will produce a situation which will require emergency remedies if we are to maintain in that territory an adequate system of transportation" (R. 187).

While the main report contains no such observations, the inadequacy of the rate of return disclosed by the report must have made their accuracy plain to the entire Commission.

(C) CONCLUSION.

In *Rates and Charges on Grain and Grain Products, supra,* the Commission had held that these rates could not be reduced consistently with the requirements of Sec. 15a. It appears from the report of the Commission in the present proceeding that there had been no improvement in the condition of the carriers in the meantime (R. 77).

In that proceeding it had also considered the condition of agriculture and in respect thereof it had said (R. 379):

> "In considering the reasonableness of rates the economic condition of an industry may be relevant as it bears on the value of the service to the industry, and as it may permanently or for a long period of time affect the ability of that industry to pay the rates assessed, but taken by itself it cannot be accepted as controlling."

In that case it had also found after careful consideration that the benefit, if any, to the individual producer would be slight, while the damage done to the railroads would be immediate and severe (R. 400). This finding repeated in substance the conclusions already stated in the report (R. 387) that:

> "The amount that would accrue to the average farmer in the event of an assumed 10 per cent. rate reduction on grain and grain products as indicated by this record is small. [On the previous page it reviews evidence showing that "the saving to the average farmer would range from a few

> dollars to $25 per year"]. On the other hand, as to some of the respondent railroads, the effect of a reduction in rates on grain and grain products to the extent here asked, in addition to what has already been made, would be little, if at all, short of disastrous."

Neither of these findings is reversed. On the contrary, the Commission in the present case found that the effect of a reduction in rates upon the producer would be more or less speculative (R. 93). Something happened in the meantime to cause the Commission to change its mind in respect of situations so similar as related both to the condition of the industry and the carriers. That which intervened was the adoption of the resolution.

In so proceeding it is our contention that the Commission proceeded upon an erroneous conception of its powers and duties under Sec. 15a and failed to discharge the latter (*infra*, p. 87 *et seq.*); and furthermore that the weight accorded to the depressed condition of agriculture as the basis for the lowest possible lawful rates on its products affected thereby is sufficient to render the order void under the decision in *Ann Arbor R. Co.* v. *United States, supra* (*infra*, p. 137 *et seq.*).

Whatever be the legal effect, however, it admits of no doubt from the face of the report that the Commission was proceeding under the resolution, either because it believed that the resolution made it its duty so to do, or out of deference to the wishes and hopes supposed to be expressed by Congress therein.

5. That, in finding existing rates unreasonable to the extent that they exceeded those prescribed, the Commission applied a standard other than that commonly applied in the determination of a maximum reasonable rate appears both from the nature of the action taken and from the report.

(A) THE COMMISSION ITSELF HAD IN OTHER CASES DISTINGUISHED BETWEEN MAXIMUM REASONABLE RATES AND THE LOWEST POSSIBLE LAWFUL RATES REFERRED TO IN THE RESOLUTION. INDEED, TO SAY THAT A RATE MAY AT THE SAME TIME BE THE LOWEST POSSIBLE LAWFUL RATE AND THE MAXIMUM REASONABLE RATE INVOLVES A CONTRADICTION OF TERMS.

In both *Muller & Co.* v. *Pere Marquette,* 151 I. C. C. 787, and *South Carolina Produce Association* v. *Aberdeen R. Co.,* 152 I. C. C. 5, the Commission itself carefully distinguished between a maximum reasonable rate and the lowest possible lawful rates referred to in the resolution. The latter, it said, were lower than the former.

In *South Carolina Produce Association* v. *Aberdeen R. Co., supra,* the Commission prescribed a lower level of rates for the future but refused to award reparation, saying:

> "In view of the fact that the rates which we propose to prescribe will be, in our judgment, the lowest possible lawful rates which may properly be prescribed, under the evidence in this case, such a standard, prescribed for the future, can not be accepted as a standard of reasonable rates in the past. The Hoch-Smith resolution directs us to take into consideration the economic necessities of

> a shipper when fixing a rate structure. Rates made in contemplation of that resolution are less than maximum reasonable rates. This inevitably follows from the provision of the law. A certain zone of reasonableness is created within the limits of which any rates so falling must be considered reasonable. We can prescribe such a basis for the future; but if we have settled upon the measure of such a rate taking into consideration the provisions of the resolution, it is clear that a rate arrived at upon such considerations is not a maximum reasonable one. If such be true, it is unsound automatically to take a rate found reasonable for the future in the light of the Hoch-Smith resolution and prescribe it in the past as a basis for reparation, because to do so would be to award damage down to the basis of a rate which admittedly is lower than a reasonable maximum."

The Commission had thus recognized the distinction between a "lowest possible lawful rate" and a maximum reasonable rate in previous cases. Indeed to say that a given rate may at the same time be the "lowest possible rate" (by whatever standard measured) and the maximum reasonable rate involves a contradiction of terms. It may be one. It cannot be both.

(B) BY MAKING APPROXIMATELY THE SAME PERCENTAGE OF REDUCTION IN RATES APPROVED OR PRESCRIBED AS REASONABLE MAXIMUM RATES UNDER SECTION 1 DURING THE PENDENCY OF THIS PROCEEDING, THAT IS MADE IN THE GENERAL LEVEL OF ALL THE RATES (SUBJECT ONLY TO A RESERVED JURISDICTION, TO BE EXERCISED IN THE PRESENT PROCEEDING, TO DETERMINE WHETHER THEY WERE ALSO THE LOWEST POSSIBLE LAWFUL RATES, REFERRED TO IN THE HOCH-SMITH RESOLUTION).

Among the existing rates approved or prescribed, during the pendency of this proceeding, are the rates from southern Idaho to Pacific Coast ports and to points in the states of California and Arizona as set forth in Appendix D to the report and from points in Utah, Idaho, Montana and Wyoming to points in Colorado (R. 250-1, 247, 272). The former were approved, or prescribed, in *Ogden Grain Exchange* v. *Arizona Eastern R. R. Co.*, 126 I. C. C. 255, 128 I. C. C. 490, 132 I. C. C. 46, and the latter in *Ogden Grain Exchange* v. *Abilene & Southern Ry. Co.*, 122 I. C. C. 691. Both cases were decided during the pendency of this proceeding (R. 23).

At the conclusion of its main report in the first named case (126 I.C.C. 255, 281), the Commission said:

> "It will be understood that our findings herein are limited to the issue of what are or will be the *reasonable maximum rates* on this traffic without regard to the provisions of the Hoch-Smith resolution. We shall leave for determination in the *pending general investigation* the question whether any of these rates *are the lowest possible lawful rates compatible with adequate transportation service.*" (Italics ours.)

The "pending general investigation" refers to the present proceeding.

The order of the Commission reduces the rates in this case approximately 14%.* The report in the other case contains a similar statement of the nature of the action taken and a similar reservation of jurisdiction to be exercised in this proceeding. As in the other case the rates

*This percentage of reduction is calculated from rates shown in the table of present and prescribed rates contained in Appendix D to the Report (R. 244 *et seq.*).

thus fixed are further reduced by this order (R. 24). In these cases, as well as in *Muller* v. *Pere Marquette, supra,* and in *South Carolina Assn.* v. *Aberdeen R. R. Co., supra,* the Commission had recognized, in the jurisdiction reserved, the distinction between a maximum rate and the lowest possible lawful rate. These reductions were obviously made in the exercise of the reserved jurisdiction and for the purpose of substituting the lowest possible lawful rates for the rates previously prescribed as maximum reasonable rates.

(C) IN MATERIALLY REDUCING THE RATES PRESCRIBED, DURING THE PENDENCY OF THIS PROCEEDING, AS MAXIMUM REASONABLE RATES FOR APPLICATION BETWEEN SOUTHERN MISSOURI, ARKANSAS, LOUISIANA AND TEXAS, I.E., THROUGHOUT THE ENTIRE SOUTHWEST.

In a series of cases, decided during the pendency of the present proceeding, the Commission prescribed a mileage scale of reasonable maximum rates for application between Arkansas, Oklahoma, Louisiana, Texas and Southern Missouri, thus embracing the entire Southwest (Report, R. 107, Petition, R. 29). The last of these cases was determined after the close of the record in this proceeding but before rendition of the report. These rates were not only established as maximum reasonable rates but were fitted into the general rate structure by being made in mathematical relationship to the first class rates in the same territory (R. 107). The scale, so prescribed, is materially reduced by the order, the average reduction in the rates on wheat up to a distance of 750

miles, within which the principal movement occurs, being approximately 15% (R. 272).

(D) BY REDUCING THE PROPORTIONAL RATES OUT OF PRIMARY MARKETS.

As appears from the report, the principal movement of grain is through certain cities described in the report as primary markets, such as Kansas City, Omaha, Sioux City, Minneapolis and St. Louis, where a large proportion is stopped for sale, storage or conversion into milled products. Whether so stopped or not the movement from such markets is at so-called proportional or reshipping rates which are lower than the local rates to the same destinations (R. 83 *et seq.*).*

As also appears from the report, these proportional or reshipping rates have been made under the stress of carrier competition, or for purposes of market equalization. The Commission has previously ruled that rates so made do not constitute a measure of reasonable maximum rates under the standards of section 1, since they are lower than would be made except for such competitive and equalizing influences.†

*The character and use of proportional rates is fully set forth in this Court's decision in *Atchison, Topeka & Santa Fe Railway Co.* v. *United States*, 279 U. S. 768, 771, 777-9. As appears therein, they are based upon a fiction, although a permissible one. As appears from that case, neither the nature nor cost of the service differs materially from that performed under local rates contemporaneously maintained. This alone is sufficient to show that such rates are among the class of so-called "depressed rates", i.e., rates lower than maximum reasonable rates.

†*Carnation Milk Products Co.* v. *Director-General*, 55 I. C. C. 665; *Canned Goods from Colorado, New Mexico, Texas and Wyoming*, 102 I. C. C. 156; *Benson Produce Company* v. *Great Northern Railway Co.*, 113 I. C. C. 541.

Appendix D to the original report (R. 244) prescribes new proportional or reshipping rates, 38 in number. In every case except two the new rates are materially lower than the present proportional rates, as appears from the report of the Commission, have been made by reason of these competitive and equalizing influences. The proportional rates thus prescribed are on an average approximately 70 per cent. of the proportional rates now in effect.

They are on an average approximately 60 per cent. only of the corresponding local rates contemporaneously prescribed by the Commission.

Many of these rates had been hitherto approved or prescribed by the Commission or characterized by it as being depressed, *i.e.*, below normal maximum reasonable rates.*

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*In *Board of Railroad Commissioners of State of Iowa* v. *Director General*, 63 I. C. C. 405, 410, 412, the Commission characterized the proportional rates from the Missouri River cities as controlled by "carrier competition" and on a basis lower than would be otherwise justified. The Commission nevertheless reduces the rate from Omaha and Kansas City to Chicago from 17½c to 15c and from Kansas City to St. Louis from 13½c to 9c. The proportional rates from Kansas City, Omaha and St. Louis to Memphis, New Orleans, Little Rock, Texarkana and the main commercial centers in Louisiana and Texas are reduced from 12% to 57%, the average being 32%. Of these the present proportional rate of 24 cents from Kansas City to Memphis, approved in *Board of Trade of Kansas City, Mo.* v. *A. & W. Ry. Co.*, 102 I. C. C. 285, is reduced by 33 1/3%. The present rates of 23.5 cents and 26.5 cents from St. Louis and Kansas City, respectively, to Little Rock, prescribed in *Arkansas Manufacturers and Jobbers Association* v. *Director General*, 59 I. C. C. 662, and in *Arkansas Jobbers and Manufacturers Asso.* v. *C. R. I. & P. Ry.*, 80 I. C. C. 620, are reduced to 10 cents, (a reduction of over 50%), and 16 cents, (a reduction of 40%), respectively; the present rate of 23.5 cents from St. Louis to Little Rock is reduced to 10 cents or more than 50% and the present proportional rate of 28.5c from St. Louis to New Orleans, approved by the Commission during the pendency of this proceeding, to 19c.

(E) BY REDUCING AN IMPORTANT PROPORTIONAL RATE PREVIOUSLY PRESCRIBED BY THE COMMISSION AS A MINIMUM RATE.

The present proportional rate of 23.5 cents from St. Louis to Little Rock was prescribed by the Commission as a *minimum*, not as a *maximum* rate. It is reduced to 10 cents, more than 50% (R. 244).

(F) BY REDUCING THE PROPORTIONAL RATE FROM ST. LOUIS TO NEW ORLEANS WHICH THE CARRIERS, DURING THE PENDENCY OF THIS PROCEEDING, WERE AUTHORIZED TO ESTABLISH AND AT THE SAME TIME TO CHARGE HIGHER RATES AT INTERMEDIATE POINTS.

This rate of 28.5 is reduced to 19 cents or 33 1/3%. Permission to establish a lower rate at a more distant point than at an intermediate point may, under the Commission's interpretation of Section 4, be granted only when the former is less than a maximum reasonable rate and the intermediate rates do not exceed maximum reasonable rates (R. 244).

(G) THE ONLY PERMISSIBLE CONCLUSION IS THAT THESE REDUCTIONS WERE MADE AS A PART OF THE PURPOSE, DISCLOSED BY THE REPORT ITSELF, TO PRESCRIBE THE LOWEST POSSIBLE LAWFUL RATES ON AGRICULTURAL PRODUCTS AND NOT FOR THE PURPOSE OF ESTABLISHING REASONABLE RATES AS JUDGED BY THE CUSTOMARY STANDARDS OF THE ACT.

Our purpose in calling the extent of these reductions to the attention of the Court is not to suggest that the

Court should substitute its judgment for that of the Commission in respect of the measure of the rates to be established, but for the purposes stated in the heading. It may be possible that all of the rates, which have been largely approved or prescribed by the Commission in the past had become unreasonable. The Commission likewise has the undoubted power to change its mind, within the standards of the act. It is most unreasonable to suppose, however, that rates prescribed as maximum reasonable rates, subject only to a jurisdiction to determine whether they were also the lowest possible lawful rates, other rates recently prescribed after careful investigation for application throughout the entire Southwest, rates fixed as minimum rates, or rates under which Fourth Section relief was accorded, became overnight rates which exceeded maximum reasonable rates to the extent of the reductions ordered. The only reasonable inference is not that the Commission changed its mind, but that it changed its standards and that it was measuring these rates by a consideration of their relation to "the lowest possible lawful rates" referred to in the resolution.

(H) By the action taken in respect of readjustments made to remove discrimination.

In addition to reducing the general level of the rates, the Commission readjusted the relationship of rates on grain or grain products to each other, where the existing adjustment was found to result in undue discrimination. A large part of the report, other than the appendix dealing with the condition of agriculture, is devoted to a discussion of these situations. Their significance to the

questions now under discussion lies in the extent to which such discrimination was ordered removed by a reduction in one of the offending rates rather than by an advance in the other, or (as is frequently the case) by a reduction in both rates, the reduction in one being greater than the reduction in the other. As pointed out by this Court in *American Express Company* v. *Caldwell, supra*, there may at the same time be two rates, each of which is within the zone of reasonableness, with the result that an existing discrimination growing out of the relation of such rates may be removed either by advancing one or reducing the other. Formerly, where undue discrimination was found, the carrier was permitted at its election to choose which course it should adopt. The Commission now has a right to say, although it may leave that determination to the carrier. If it is done by an advance in one of the offending rates, the carriers' revenues are preserved and increased. If by the other course, they are reduced. The Commission appears to have pursued the policy in this case of requiring that such discrimination be removed by a reduction of those rates which were on the higher level.

One of the major questions involved on this branch of the case concerned the relation between the rates on wheat and flour. In certain parts of the territory these rates were the same, while in others the flour rates exceeded the wheat rates by seven cents. The Commission found that, from the standpoint of relative loadings, values and transportation characteristics, the propriety of equal rates on the two might be questioned. Other considerations of a commercial or economic character indicated the propriety of such equalization. The Commission

found that the rates on the two should be the same (R. 102-3). We are not quarreling with this decision as an exercise of the Commission's administrative jurisdiction. It is significant, however, that it was accomplished by making the wheat rates applicable on flour and at the same time over wide areas reducing the rate on wheat itself. In other words, the Commission required the discrimination to be removed by reducing the higher rate to the lower and then, in turn, reducing the latter. Obviously, it was looking for the lowest possible lawful rate, not for a reasonable maximum.

Of the specific situations dealt with the first relates to the rates from Southeastern Missouri to Cairo, claimed by Cairo to be unduly high as contrasted with the rates from St. Louis, East St. Louis and Memphis. The Commission finds undue prejudice but states that it will be remedied by the rates prescribed (R. 667). Reference to the rates prescribed discloses that the remedy was brought about by materially reducing all of the rates, whether on wheat or coarse grains, to Cairo (Appendix D; R. 258). Many other illustrations could be given.

6. The foregoing conclusions are supported by the concurring opinion of Commissioner Eastman which contains the only extended consideration of the applicable law to be found in the Report.

Commissioner Eastman's concurring opinion contains the only extended discussion of the applicable law to be found in the Report.

This discussion begins as follows:

> "Throughout this proceeding the Hoch-Smith Resolution has been emphasized. In a situation like that which is here presented that resolution makes it our duty to prescribe the 'lowest possible lawful rates compatible with an adequate transportation service'." (R. 168).

The reference to the situation presented is obviously to that presented by the condition of agirculture as reviewed in the Report and as found by the Commission.

The Commissioner then refers to the decision of this Court in *Ann Arbor R. Co.* v. *United States.*

Having done so his opinion then contains an excerpt from a previous report of the Commission (*Grain and Grain Products,* 122 I. C. C. 235, 264) preceding the report in the *Deciduous Fruit* case and which purports to set forth the Commission's interpretation of the Hoch-Smith Resolution and of its effect upon the powers and duties of the Commission. Precisely the same excerpt was contained in the report of the Commission in the *California* case. The substance thereof is contained in the argument submitted to the Court in support of the validity of the order therein set aside.

The substance of the Commissioner's interpretation is that the Commission was, prior to the adoption of the Hoch-Smith Resolution, empowered to make the lowest possible lawful rates, through the exercise of the powers conferred by Sections 1 and 15 (1), and that the effect of the resolution was to direct the Commission to exercise this power in respect of the rates on agricultural products, affected by depression. This is precisely the theory upon which it was sought to sustain the order made in the *Deciduous Fruit* case in the argument to this Court in *Ann Arbor R. Co.* v. *United States.*

While certain portions of this opinion may be regarded as expressing the individual views of the Commissioner, the conclusions may be taken to represent the views of the Commission as a whole, for the following reasons:

1. Although seven other Commissioners filed concurring opinions, and two more concurred in those of others (R. 148 *et seq.*), none dissented from the views expressed by Mr. Eastman.

2. The conception of power and duty therein stated is that stated in *Grain and Grain Products, supra.* This report contains the first interpretation placed upon the Resolution by the Commission. It is that urged upon this Court in *Ann Arbor R. R. Co.* v. *U. S., supra.* It is that which was followed by the Commission in *Muller* v. *Pere Marquette R. Co. and South Carolina Produce Association* v. *Aberdeen R. Co., supra.,* and is one, from which the Commission has apparently never receded, since the power asserted was one, which counsel for the Commission asserted, in the Court below, that it possessed. Commissioner Eastman had dissented in the California case because he believed that the rates established were lower than permissible under the standards of the Interstate Commerce Act. He believed that the Commission had, as the Court said it had, measured the rates by standards supposed to have been created by the resolution instead of by the Act. There never, however, had been any disagreement between Commissioner Eastman and the Commission that the Commission possessed the power asserted, and was directed by the Hoch-Smith Resolution, to exercise it in respect of agricultural products affected by depression, as and in manner stated in *Grain and Grain Products, supra.* The

only point on which they had been in disagreement was in respect of the standard to be used in performing such duty, the Commissioner being of the opinion that the standard used in the subsequent California case was a standard, different than described in *Grain and Grain Products* and lower than legally permissible. The conception of the Commission's powers and duties, as stated in his concurring opinion, therefore, was nothing new. It represented the view of the Commission itself as well as that of Commissioner Eastman. Commissioner Eastman apparently thought that the only effect of the Court's decision was to settle the question upon which he and his associates had previously been in disagreement, *viz.*, the standard by which the lowest possible lawful rates which both he and the Commission considered themselves to be required to make by the resolution. The conception of the Commission's powers and duties stated in the concurring opinion is thus but a reiteration of the Commission's own original interpretation both of its powers and of its duties, as affected by the Resolution.

3. It is not inconsistent with anything contained in the main report. On the contrary it is the only theory consistent with the treatment accorded in the main report to Section 15a and with the only facts which the report contains.

It is believed that the Commission is neither possessed of the power, nor under the duty asserted, but that the order of the Commission is predicated upon the conception of power and duty, set forth by Mr. Eastman, is, we believe, the conclusion which necessarily follows from a consideration of the main report, the concurring opinions and the action taken.

II

IT WAS THE DUTY OF THE COMMISSION TO CONSIDER SEC. 15A.

The Commission in its report recognized the existence of this duty.* Under these circumstances, we should not have supposed that anyone would have denied that such was the duty of the Commission. In the District Court, counsel for the Commission, however, as well as counsel for all other appellees, took the position that it was not the duty of the Commission to give any consideration to Section 15a in this case. The same argument will probably be renewed here.

1. Section 15a must be taken into consideration by the Commission in a case of the character of the Grain case (quite apart from the fact that it is a part of a general rate structure investigation), as the Grain case embraces the general level of all the rates of all the carriers on a major description of traffic in two of the rate groups established by the Commission for the purpose of administering Section 15a.

The argument below was that the Commission is not required to give any consideration to the requirements

*The Commission in its report says (R. 77) that in determining whether there should be a general reduction in the rates, it must take into account, among other things, "whether the general level of rates on all traffic as a whole is sufficiently high to accord to the carriers the rate of return contemplated by law, including Section 15a of the interstate commerce act." While the Commission thus recognized a duty to consider this section it erred in its conception of what that duty was.

of Section 15a in any case, of whatever scope, and however direct a bearing the action taken may have upon the rate of return of *all* of the carriers in one or more of the rate making groups established by the Commission under Section 15a, save only in a proceeding in which all of the rates of such carriers are under review at one time; as for example, in *Increased Rates, 1920,* 58 I. C. C. 220, and *Reduced Rates, 1922,* 68 I. C. C. 676.*

It is not true that the Commission is required to give consideration to Section 15a only in cases wherein the general level of *all* rates is under consideration. It must as clearly give it consideration in any case in which the general level of the rates of all the carriers on any major description of traffic is the question primarily at issue. Such a case is one directly affecting the carriers' revenue and rate of return, as distinguished from one relating primarily to the reasonableness of particular rates.

In the Court below counsel for the appellee relied in support of their contention on the proviso contained in Section 15a and on certain language used by the Court in *Dayton-Goose Creek Ry. Co.* v. *United States,* 263 U. S. 456, to support the contrary contention. The proviso reads:

> "* * * *Provided,* That the Commission shall have *reasonable latitude* to modify or adjust *any particular rate* which it may find to be unjust or unreasonable, and to prescribe different rates for different sections of the country." (Italics ours.)

*In the former case the Commission authorized a horizontal percentage increase in all rates and in the latter case required a horizontal reduction therein (R. 10, 11).

This is not a case dealing with a particular rate or even with particular rates. Aside from the fact that it is a part of a general rate structure investigation embracing all of the rates in the country, this *Part VII* itself deals with hundreds of thousands of rates, embracing *all* of the rates of *all* of the carriers on a major description of traffic in two of the four rate-making groups, into which the Commission divided the United States pursuant to Section 15a and for the sole purpose of administering that section. The action of the Commission thus bears directly, and not merely incidentally, upon the carriers' aggregate net income and rate of return. In the report the general level of the rates, as distinguished from particular rates between particular points, is emphasized as being the main issue (R. 76-7).

The extent to which the Commission may disregard the requirements of Section 15a in cases other than those wherein all of the rates of the carriers are under review in a single proceeding, is moreover specifically limited by the proviso itself to the exercise of *"reasonable latitude"* in the establishment of "any particular rate". This, in itself, is a limitation upon the power of the Commission to disregard Section 15a even when dealing with particular rates. The language of the proviso, so far from supporting the contention that in a case of this description, involving the revenue of all the carriers in the Western District from a major description of traffic, the Commission is not required to give consideration to Section 15a and to the effect of such action upon the revenues of the carriers, supports just the contrary conclusion.

The language relied on in *Dayton-Goose Creek Railway Company* v. *United States*, 263 U. S. 456, is:

> "It should be noted that, in reaching a conclusion, upon this first proposition, we are only considering the general level of rates and their direct bearing upon the net return of the entire group. The statute does not require that the net return from all the rates shall affect the reasonableness of a particular rate or a class of rates. In such an inquiry, the Commission may have regard to the service done, its intrinsic cost, or a comparison of it with other rates, and need not consider the total net return at all" (p. 480).

That case presented but a single question for decision, to wit, the constitutionality of the recapture clause. The extent to which the Commission was relieved, if at all, from giving consideration to Section 15a in any case was not involved, and no determination of that question was necessary to the decision.

The argument addressed to the Court below was made to the Commission in *Rates and Charges on Grain and Grain Products, supra* (R. 341), and was made, as now, in reliance on the foregoing language of the Court in *Dayton-Goose Creek Railway Company* v. *United States, supra.* The Commission referring specifically thereto said:

> "This does not forbid us to consider the net return of the carriers but merely says that we need not when considering a particular rate or class of rates. The matter is for our sound discretion. Nor does it limit or qualify our duty under the above-quoted provision of section 15a. *If the reduction in the particular rate or class*

of rates has no substantial effect upon the aggregate carrier revenue there may be no occasion for considering the latter duty. If, on the other hand, it has a substantial effect upon the aggregate revenue, such occasion arises." (R. 390-1; italics ours.)

The revenue effects of the action taken in this proceeding were direct and substantial. Indeed, the subject matter of the present case is precisely the same as that from which the foregoing excerpt was taken, to wit, the rates on grain and grain products of all of the carriers in both of the rate-making groups involved. The Commission rightly held that in such a case it was its duty to consider the requirements of Section 15a.

It may well be doubted whether, in the excerpt quoted from *Dayton Goose-Creek Ry. Co.* v. *U. S.*, *supra,* the Court intended to say that the Commission was privileged in any case to shut its eyes entirely to the requirements of Sec. 15a, or to do any more than to point out that particular rates might in themselves be unreasonable, even though the carriers' rate of return was inadequate. Certainly it could not have been intended to mean that the Commission could wholly disregard the requirements of Sec. 15a when dealing with the general level of rates on a major description of traffic. Such an interpretation would extend the operation of the proviso beyond the exercise of a reasonable latitude. Indeed, it would result in a complete nullification of Sec. 15a and would permit the Commission by successive reductions in the general level of rates on each of the several major descriptions of traffic to reduce the whole

body of rates to such a point that they would clearly be insufficient to produce the fair return contemplated and require the Commission to retrace its steps by a general advance in all such rates, the carriers in the meantime being prevented by the action of the Commission from realizing as nearly as may be a fair return. That the Court did not by this language intend what is now imputed to it is evidenced by the frequent references to Sec. 15a in *Ann Arbor RR. Co.* v. *United States* involving a much less volume of traffic and in which the revenue effects, although direct, were less in amount.

2. Assuming for the purposes of the argument that the Commission need give consideration to Section 15a only in a case dealing with the general level of all of the rates (and not in a case dealing with the general level of the grain rates), this proceeding is precisely that case, as it is a general investigation into the entire rate structure of the country instituted pursuant to the second paragraph of the Hoch-Smith Resolution, the Grain case being merely a part thereof so designated by the Commission for purposes of convenience.

Assuming the law to be as urged by the appellee below the Commission was, as stated in the report, required to give proper consideration and effect to Section 15a. This proceeding was instituted under the Hoch-Smith Resolution (R. 19, 59, 76), the second paragraph of which requires the Commission to inquire into the rate structure of the country as a whole and to bring it into conformity with all of the mandates of the law including Section 15a.

The present proceeding is merely a subdivision of such general inquiry into *all* of the rates of *all* of the carriers. In the conduct of this general investigation it was as much the duty of the Commission to consider Section 15a, and in reconstructing the rate structure thereunder to take into account its provisions, as though the proceeding were one instituted by the carriers for a general increase in rates. Moreover, the performance of this duty was not left to inference but the Commission was specifically directed in such rate structure investigation to give heed to the provisions of Section 15a as well as to other sections of the Act. By the resolution itself the Commission is directed to give due regard "to the maintenance of an adequate system of transportation". As pointed out by this Court in *Ann Arbor R. Co. v. United States, supra,* at p. 667, Section 15a is the provision made by Congress itself as the means whereby the maintenance of an adequate system of transportation is to be accomplished. As held by the Court in that case, the Hoch-Smith Resolution did not limit or qualify the provisions of Section 15a as written. The fact that the Commission saw fit to subdivide the rate structure investigation into several parts instead of carrying it on as a single proceeding could not, and did not, excuse the Commission from giving consideration to Section 15a in each of such subdivisions, which together constituted a complete and comprehensive inquiry into the rate structure as a whole, which the Commission was directed to make. On counsel's own hypothesis, therefore, the Commission was required in this proceeding to give con-

sideration to the requirements of Section 15a and in so doing to construe that section properly.

3. Since the Commission did give consideration to Section 15a, if it placed a wrong interpretation thereon, its order is void.

But, as appears from the report, the Commission said that it was its duty to give consideration to Section 15a and did give consideration thereto. If in so doing it placed a wrong interpretation thereon, its order is clearly void, because based upon a misconception of its powers and duties. The Court will not, under such circumstances, speculate as to what action the Commission would have taken if it had properly construed the law. *Southern Pacific Co.* v. *Interstate Commerce Commission*, 219 U. S. 433, *Ann Arbor R. Co.* v. *U. S., supra*, *St. Louis & O'Fallon Ry. Co.*, 279 U. S. 461, *United States* v. *N. Y. Central RR. Co.*, 263 U. S. 603, *Florida* v. *United States*, 282 U. S. 194.

III

THE EFFECT OF THE ORDER IS MATERIALLY TO REDUCE THE GENERAL LEVEL OF THE RATES ON A MAJOR DESCRIPTION OF TRAFFIC WITHOUT ANY FINDING THAT THE CARRIERS' RATE OF RETURN WAS, OR IN THE NEAR FUTURE, WOULD BE IN EXCESS OF THAT CONTEMPLATED BY SECTION 15a, BUT, ON THE CONTRARY, AT A TIME WHEN SUCH RATE OF RETURN WAS MATERIALLY BELOW THE STATUTORY REQUIREMENT, AND WITHOUT ANY FINDING, OR BASIS FOR FINDING, THAT SUCH REDUCTION WOULD RESULT IN INCREASED REVENUES THROUGH STIMULATING AN INCREASED VOLUME OF TRAFFIC.

That part of the report in which the financial condition of the carriers is considered and reviewed is as follows (R. 77):

> *"Financial Condition of Carriers in the Western District.*
>
> "The percentage rates of return of Class I carriers in the western district, by regions, for the calendar years 1921-28 were as follows:

	REGIONS			
	Northwestern	Central western	Southwestern	Western District
1921	1.42	4.45	3.17	3.12
1922	2.78	4.07	3.27	3.45
1923	3.45	4.50	3.65	3.96
1924	3.12	4.21	4.34	3.87
1925	3.60	4.41	4.37	4.13
1926	3.83	4.86	4.56	4.45
1927	3.40	4.28	3.98	3.97
1928	4.04	4.59	4.32	4.35

"The above percentages are computed on the investment of the carriers, as shown by their books, including materials and supplies and cash as of the beginning of the year.

"For 10 railroads having 75 per cent or more of their mileage in western trunk-line territory[a] the average rate of return on book value was 2.97 per cent in 1927. In that year also, on the same basis as used in the table above, the returns for individual carriers were 3.66 per cent for the Chicago & North Western, 4.53 per cent for the Chicago, Burlington & Quincy, 4.26 per cent for the Illinois Central, 5.06 per cent for the Atchison, Topeka & Santa Fe system, 4.49 per cent for the Union Pacific system and 3.71 per cent for the Southern Pacific Company. For the years 1921-1927, inclusive, the Oregon-Washington Railroad & Navigation Company earned 1.02 per cent on its book value. The composite earnings of the Great Northern, Northern Pacific, and Minneapolis, St. Paul & Sault Ste. Marie in 1927 yielded 4.75 per cent on our valuation, without considering subsequent investment. During the seven years after the termination of Federal control these roads were short $189,775,069 of making a 5.75 per cent return on property investment and $136,265,151 short of that return on our valuation. In the year 1927 the corresponding shortage was $12,758,736 on our valuation. The Great Northern and Northern Pacific during the 10-year period 1916-1926 added $216,144,016 to their investment, but in 1926 their net railway operating income was $3,394,410 less than for the year ended June 30, 1916, before they made this

[a] "Chicago & Alton; Chicago & North Western; Chicago, St. Paul, Minneapolis & Omaha; Chicago, Burlington & Quincy; Chicago Great Western; Chicago, Milwaukee, St. Paul & Pacific; Minneapolis & St. Louis; Minneapolis, St. Paul & Sault Ste. Marie; Green Bay & Western; Quincy, Omaha & Kansas City."

> additional investment. The foregoing statements were practically undisputed upon this record."

The Commission made no other finding in respect of the carriers' rate of return or financial condition. All of its conclusions in respect thereof were based upon the facts recited in the foregoing excerpt.

In *Rates and Charges on Grain and Grain Products, supra* (R. 341), decided immediately prior to the adoption of the Hoch-Smith Resolution, the Commission found that the carriers' rate of return was less than that contemplated by Section 15a and that the general level of the rates on grain and grain products could not be reduced consistently with the requirements of said section (R. 399-400). As appears from the report, that case was decided primarily upon the results of operation in 1923. As appears from the foregoing table, the carriers' rate of return in that year was 3.96, while in the last year preceding the close of the record in the present proceeding (1927) it was 3.92.

In a special report to the Senate Committee on Interstate Commerce, dated January 21, 1931, the Commission, through its legislative committee, said:

> "The railroads have never been able, since 1920, to obtain the aggregate earnings contemplated by section 15a, and they are faced with continually increasing competition from other forms of transportation" (R. 12).

The Commission, of course, knew this when it made the order.

The average rate of return during the eight-year period covered by the table set forth in the Commission's report was 3.9%.

There is absent from the report any finding that the carriers' rate of return exceeded or was likely in the near future to exceed the statutory standard. On the contrary it affirmatively appears that it was materially less.

In *Kansas Public Utilities Commission* v. *A. T. & S. F. Ry. Co., supra* (R. 327, 336), wherein the general level of the rates on grain and grain products was under review, the Commission found as follows:

> That it was improbable that a reduction in the then existing rates would so increase the movement of grain and grain products as to enable the carriers to make up to any appreciable extent the loss in revenue should a general reduction in these rates be ordered.

In *Rates and Charges on Grain and Grain Products, supra* (R. 341, 399), the Commission made the following specific finding:

> "(g) That we have no assurances on this record that there will be such further increases in tonnage or such reductions in operating expenses in the immediate future as to enable respondents to earn an excess over a fair return. Any further reduction in revenue would increase the shortage in the fair return of carriers in the Western group."

The report in the present proceeding contains no finding that a reduction in the rates would so increase the movement as to enable the carriers to make up to any appreciable extent the loss in revenue resulting from a general reduction. On the contrary, it appears from the report that the Commission in making its order was

fully conscious of the fact that substantial reductions in revenue would result (R. 148).

Moreover, in their petition for rehearing the carriers, after alleging that their traffic and revenue had greatly declined since the close of the record in 1927, alleged and offered to prove that the traffic in grain and grain products was the only major classification of traffic, the volume of which had not declined since the close of the record in 1927 (R. 529).*

The petition for rehearing further alleged that said traffic was moving freely in the same volume as before, and would be nowise increased by the reduction in rates thereon, which would not stimulate the movement of these commodities, the extent of which was determined by production and demand and did not vary with changes in transportation charges (R. 529).

It would, we think, be stretching the presumptions, which attach to an order of the Commission, to hold that in any case reductions of the character herein made, and at the time and under the circumstances made, could be sustained without a specific finding that they would in reality result in stimulating movement and would thus preserve and perhaps increase revenues. Certainly no such presumption may be made where, as in this case, the Commission itself found that the revenue effects would be substantial (R. 148) and that the benefit, if any, which would accrue to the producer would be more or less speculative (R. 93).

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*This petition alleged, among other things, that while the total number of loaded cars had declined from 18,590,123 in 1927 to 16,997,406 in 1930, the number of cars of grain and grain products in the two years were substantially the same, to wit, 1,577,792 in 1927 and 1,576,091 in 1930.

IV

THE COMMISSION MAY NOT ESTABLISH THE LOWEST POSSIBLE LAWFUL RATES AT A TIME WHEN THE CARRIERS' RATE OF RETURN IS BELOW THE STATUTORY STANDARD. IN SO DOING IT NOT ONLY PROCEEDED UPON A MISCONCEPTION OF ITS POWERS BUT FAILED TO DISCHARGE THE DUTY IMPOSED BY SECTION 15a.

1. Sections 1, 15 and 15a must be read together. Section 15a qualifies and controls the powers which may be exercised under Sections 1 and 15 in any case in which the Commission is required to give the former consideration.

Sec. 1(5) provides that all rates and charges shall be just and reasonable, and that every unreasonable charge is prohibited and declared to be unlawful.

Sec. 15 empowers the Commission to determine and prescribe just and reasonable rates to be thereafter charged in proceedings instituted before it, but *only* after full hearing and *only* if the existing rate is unreasonable and unlawful.

Section 15a (2) provides:

> "In the exercise of its power to prescribe just and reasonable rates the Commission shall initiate, modify, establish or adjust such rates so that carriers as a whole (or as a whole in each of such rate groups or territories as the Commission may from time to time designate)

> will, under honest, efficient and economical management and reasonable expenditures for maintenance of way, structures and equipment, earn an aggregate annual net railway operating income equal, as nearly as may be, to a fair return upon the aggregate value of the railway property of such carriers held for and used in the service of transportation: *Provided*, That the Commission shall have reasonable latitude to modify or adjust any particular rate which it may find to be unjust or unreasonable, and to prescribe different rates for different sections of the country."

This section casts an affirmative duty upon the Commission. It requires that it "shall" so establish or adjust rates that the carriers, as a whole, "will" earn a fair rate of return. This duty it is to perform "in the exercise of its power to prescribe just and reasonable rates" (*i.e.*, in the exercise of the powers conferred by Sections 1 and 15). The three sections are thus linked together, and the standard created by Sec. 15a must be read into and becomes a part of the standard created by Sec. 1. In any case in which the Commission is required to give effect to Sec. 15a, that section, in addition to casting an affirmative duty upon the Commission, limits the powers which it might otherwise have exercised under Sec. 1. The extent of such limitation and its application to this case will be discussed later.

2. (a) Prior to the enactment of Sec. 15a the carriers as a whole were permitted to earn a fair return out of the aggregate of the separately established rates, if able to do so.

(b) The purpose and object of Sec. 15a was to insure the receipt of an aggregate revenue by the carriers as a whole sufficient to support an adequate system of transportation.

(c) Congress itself fixed the standard by which such adequacy is to be determined, viz., by the application to the revenues of the carriers as a whole of Amendments V and XIV of the Constitution, limiting the right of public authority to establish rates for a local single product public utility and theretofore applicable to individual carriers only.

(d) For this purpose and as the means of its accomplishment Congress imposed upon the Commission an affirmative duty so to adjust rates as to produce the desired result, as nearly as may be, through the exercise of the powers theretofore conferred by Sections 1 and 15.

As declared by this Court, its enactment marked a new departure in rate making. *Railroad Commission of Wisconsin* v. *C. B. & Q. R. R. Co.*, 257 U. S. 563, 584-5. That is, it added something to the law as it stood before. See also the *New England Divisions Case*, 261 U. S. 184, 189. What it added, it added by way of the imposition of a new duty upon the Commission, not theretofore resting upon it.

The Fifth and Fourteenth Amendments restrain the Federal and State Governments respectively from imposing upon any public utility, including a railroad, rates insufficient to pay the cost of operation and a fair return upon the value of the property. The rule thus established is simple of application to a local one-product

public utility, customarily enjoying a monopoly. The reasonableness of the rates imposed is to be determined primarily by a consideration of the relation between the resulting net revenue and the value of the property. The practical application of this rule is substantially more difficult in the case of railroads, first, because of their competitive relationship with each other, and second, because the charges made, instead of being for units of like services, are for a multitude of different services performed for a multitude of different commodities in a multitude of different localities, thus bringing into existence the necessity for a distribution of the revenue requirements among the several services performed.

Under the old order of things rates for each of these services were separately determined without regard to revenue requirements as a whole. The aggregate revenues of the carriers were the product of these separately established rates. The statute *permitted* the carriers, as a whole, to earn a fair return from such aggregate revenues but gave no assurance that they would and cast no duty upon the Commission to see that they did.

Moreover, prior to the enactment of Section 15a, there was no standard whereby the adequacy of the revenues of the carriers as a whole, or in any given section of the country, was required to be measured. Theoretically, any railroad was protected against the imposition by public authority of rates, the general level of which, or which taken as a whole, failed to produce a fair return upon the value of its property. As a practical proposition, it could not obtain relief therefrom, however, unless the competing railroads in its own section were in a position to make the same showing. See *Minnesota Rate Cases*, 230 U. S. 352,—in which the state

rates were held to be confiscatory against the Minneapolis & St. Louis, but not as against the Great Northern and Northern Pacific. The result, of course, was that the Minneapolis & St. Louis could not take advantage of its legal right to increase its fares, since the effect of such increase would be to drive the business to its more prosperous competitors. Nor may the Fifth Amendment be taken advantage of by a group of railroads which, as a whole, are receiving less than a fair rate of return. The constitutional protection afforded is limited to the particular person whose rights have been invaded. There was, therefore, no legal standard for the measurement of the adequacy of railroad revenues as a whole.

Congress by Section 15a provided such a standard. In so doing it provided for application to the revenues of the railroads, as a whole, the rule of the Fifth and Fourteenth Amendments as applied to the rates of a single public utility. In so doing it recognized that under such a rule of rate-making—and Section 15a (2) is a rule of rate-making—certain carriers would probably receive more than a fair rate of return. Hence the recapture clause by which any such carrier was required to hold one-half of such excess in trust for the United States. Such, then, was the purpose and object of Section 15a.

In *Railroad Commission of Wisconsin* v. *Chicago, Burlington & Quincy R. R. Co.*, 257 U. S. 563, 585, the Court said:

> "The new measure imposed *an affirmative duty* on the Interstate Commerce Commission *to fix rates* and take other important steps to maintain an adequate railway service for the people of the United States." (Italics ours.)

In the *New England Divisions Case*, 261 U. S. 184, 189, the Court said:

> "Transportation Act, 1920, introduced into the federal legislation a new railroad policy. *Railroad Commission of Wisconsin v. Chicago, Burlington & Quincy R. R. Co.*, 257 U. S. 563, 585. Theretofore, the effort of Congress had been directed mainly to the prevention of abuses; particularly, those arising from excessive or discriminatory rates. The 1920 Act sought to ensure, also, adequate transportation service. That such was its purpose, Congress did not leave to inference. The new purpose was expressed in unequivocal language. And to attain it, new rights, new obligations, new machinery, were created. The new provisions took a wide range. Prominent among them are those specially designed to secure a fair return on capital devoted to the transportation service. Upon the Commission, new powers were conferred and new duties were imposed."

To the same effect are: *Dayton-Goose Creek Ry. Co. v. United States*, 263 U. S. 456, 478, and *New York v. United States*, 257 U. S. 591, 602.

The purpose and effect of Section 15a was, therefore, to substitute for the old system of regulation, under which the railroads, as a whole, were permitted to earn a fair return out of the aggregate of separately established rates, if sufficiently high, for the purpose, a new rule of rate-making designed to insure such a return and to impose upon the Commission the affirmative duty so to adjust rates as to accomplish such result.

Although the purpose was to provide for the maintenance of an adequate transportation system, Congress did not leave to the determination of the Commission either the standard by which the attainment of this object was to be achieved, or the means of its attainment. It itself provided the standard by requiring that the rates should be such as to provide, as nearly as might be, a fair return upon the aggregate value of railway property, and the means of its realization by directing the Commission so to adjust the rates. As declared by this Court in *Ann Arbor R. Co.* v. *United States, supra,* Sec. 15a is the provision made by Congress itself as the means provided for the maintenance of an adequate transportation system as a whole. This necessarily excludes any power in the Commission to substitute therefor some other standard or some other means of accomplishing the desired result.

It follows

(1) That Sec. 15a is not a mere permission to earn out of the aggregate rates established a fair return, if possible: It imposes upon the Commission the positive duty to establish such rates as to achieve such result as nearly as may be;

(2) That the rate structure and the level of the rates to be established are to be determined by reference to the required rate of return, not by conclusions of the Commission independently thereof as to what is good for the country or the carriers, or what kind of structure is sufficient for the maintenance of an adequate system of transportation.

3. The Commission may not consistently with the requirements of Sec. 15a prescribe the lowest possible lawful rates in the absence of a finding that the group rate of return received by the carriers exceeds the statutory standard or at a time when it is materially below the same, where the effect of such action is to deprive the carriers *pro tanto* from earning such rate of return.

(A) THE PRESCRIPTION OF THE LOWEST POSSIBLE LAWFUL RATES NECESSARILY PRESUPPOSES THE EXISTENCE OF OTHER POSSIBLE RATES WHICH, IF PRESCRIBED WOULD BE WITHIN THE ZONE OF REASONABLENESS AND HENCE REASONABLE AND LAWFUL UNDER SECTION 1.

To attain the end sought Congress placed upon the Commission the affirmative duty to establish and adjust rates so as to achieve the desired result. The duty imposed is to be performed by the Commission "in the exercise of its power to establish just and reasonable rates". This power had already been conferred by Sec. 1. Prior to the enactment of Sec. 15a it had long been recognized that there was no absolute measure of a reasonable rate but that there was a zone of reasonableness within which any rate might be reasonable and just under Sec. 1. Such fact was recognized by the court in *American Express Co.* v. *Caldwell*, 244 U. S. 617, 624. In the fixing of rates under Sec. 1, considered independently of Sec. 15a there is therefore a certain latitude of judgment to be exercised.

In *Grain and Grain Products, supra,* the Commission, speaking of the phrase "lowest possible lawful rates" referred to in the resolution, said:

> "It sets no new standard of lawfulness, but provides, in effect, that to the extent that there are flexible limits to our discretion, we shall require the maintenance of the *lowest rates falling within those flexible limits.* * * *"

The "lowest possible lawful rates" are thus defined as the "lowest rates falling within the flexible limits of the Commission's discretion". This of necessity means that there are other and higher rates which might, within the limits of such discretion, have been established, and if established, would have been reasonable and lawful.

The effect of Sec. 15a is to require the Commission so to exercise this discretion. Otherwise the requirement of Sec. 15a that the Commission shall so exercise its powers under the earlier sections as to produce such result, is meaningless. Particularly does such duty arise in a general inquiry, such as this, into the rate structure as a whole, which has for its purpose the bringing of the same into harmony with all the standards of the Act, including that of Sec. 15a. Obviously the duty so imposed excludes the power to establish rates at the lower boundary of the zone of reasonableness (*i.e.*, to establish the lowest possible lawful rates) where the effect of such action is to prevent the carriers from receiving the rate of return contemplated.

In *Ann Arbor R. Co.* v. *United States*, 281 U. S., at page 661, the Commission, in its argument, referring to the phrase, the "lowest possible lawful rate" contained in the Hoch-Smith Resolution, said:

> "The resolution recognizes, both as a legal and factual possibility, that there may be a lowest possible lawful rate and, conversely and necessarily, a highest possible lawful rate."

The establishment of the "lowest possible lawful rates" thus necessarily presupposes, as evidenced by the argument of the Commission in that case, the existence of other and higher figures, within the zone of reasonableness, which, if established, would satisfy the requirements of Sec. 1 that all rates shall be just and reasonable.

(B) THE PRESCRIPTION OF SUCH RATES AT SUCH A TIME RESULTS IN THE MAKING OF RATES LOWER THAN ARE NECESSARY TO MEET THE REQUIREMENTS OF SEC. 1 AND PRO TANTO PREVENTS THE CARRIERS FROM RECEIVING AS NEARLY AS MAY BE A FAIR RETURN.

There is thus inherent in any assertion of power to establish the "lowest possible lawful rates" an assumption of the power to prescribe a rate lower than necessary to meet the requirements of Sec. 1. The necessary effect of such action at a time when the carriers' rate of return is inadequate under Sec. 15a is to deprive the carrier *pro tanto* of the opportunity to earn such fair return "as nearly as may be", however these words may be construed. Rates established as "the lowest possible lawful rates" are of necessity lower than might have been fixed and yet have been within the zone of reasonableness and hence reasonable and lawful under Sec. 1. The argument of the Commission in the *Ann Arbor* case that there might be a figure representing the highest possible lawful rate and a different figure representing the lowest possible lawful rate establishes this beyond question.

That such is the effect may be illustrated by a consideration of the action taken in *Muller* v. *Pere Marquette R. R. Co., supra.* In that case the Commission reduced

the rate on chicory from 44¢ to 29¢. It found that chicory was an agricultural product affected by depression. It found that the existing rate of 44¢ did not exceed a maximum reasonable rate but exceeded the "lowest possible lawful rate" which it found to be 29¢. The lower boundary of the zone of reasonableness was therefore in that case not higher than 29¢ and the upper boundary not lower than 44¢. Within these limits any rate might be reasonable and lawful under the standards of Sec. 1, considered independently of Sec. 15a. If, in the exercise of the powers conferred by Sections 1 and 15, all rates were established on such a basis, it is self-evident that the carriers could never achieve a fair rate of return. It is equally plain that when the carriers' rate of return is inadequate, action such as was taken in the *Muller* case *pro tanto* deprives the carriers of the opportunity to earn such a rate of return, as nearly as may be, by prescribing rates lower than necessary to keep them within the zone and hence satisfy the requirements of a reasonable rate under Section 1.

(C) THE FUNDAMENTAL ERROR OF THE COMMISSION LAY IN ITS FAILURE TO RECOGNIZE THAT IN A PROCEEDING IN WHICH THE COMMISSION WAS REQUIRED TO CONSIDER SECTION 15A THAT SECTION REQUIRED THE COMMISSION TO EXERCISE THE POWERS THERETOFORE CONFERRED BY SECTIONS 1 AND 15, TO DETERMINE THE POINTS IN THE ZONE OF REASONABLENESS AT WHICH RATES SHOULD BE ESTABLISHED, SO AS TO PRODUCE, OUT OF THE AGGREGATE OF ALL SUCH RATES, A FAIR RATE OF RETURN, AS NEARLY AS MAY BE. OTHERWISE, THAT SECTION IS RENDERED MEANINGLESS.

It is a matter of common knowledge that the tendency of a railroad or other other public utility is to make the rates as high as traffic will bear. On the other hand, the tendency of public authority is to make them as low as possible. Sections 1 and 15 impose a restraint upon the power of the carrier in the pursuit of the former tendency to exact an unreasonable or exorbitant charge. Section 15a does not afford it any new license so to do or prohibit the Commission from reducing such a rate even though the carriers' returns may be inadequate. On the other hand, Sec. 15a is obviously intended as a curb upon the tendency on the part of public authority to "make the lowest possible lawful rates", insofar as such restraint is necessary to produce out of the aggregate rates established the required rate of return. Clearly this result could not be achieved if all rates were fixed at the lowest possible lawful level under the standards of Sec. 1.

In *Grain and Grain Products, supra,* 264, the Commission defined the lowest rate which could be made within the flexible limits of its discretion as one "high enough to cover all the cost that may be fairly allocated to the service plus at least some margin of profit." In his concurring opinion in the present proceeding Commissioner Eastman accepted this definition with the qualification that "for the sake of clarity we should have used the words 'some substantial margin of profit' " (R. 169).

For the sake of the argument, either definition may be accepted as the "lowest rate falling within the flexible limits" of the Commission's discretion. In either case there is necessarily a higher rate which might have been made and if made would have been within such limits.

In either case the margin of profit allowed, through the exercise of this discretion, directly affects the carriers' rate of return. It is out of the margins of profit allowed in the aggregate of the rates, thus separately established, that the rate of return accrues.

Each of the definitions stated obviously has reference to powers which the Commission is assumed to possess under Sections 1 and 15, *viz.*, to exercise its discretion, to determine the margin of profit to be realized out of the several separately established rates to be fixed. It is exactly that discretion which Section 15a requires be exercised, so as to produce, as nearly as may be, a fair return out of all of the rates thus separately established. Under such circumstances, the Commission may not make the lowest rates falling within the limits of such discretion where the effect is to prevent the accomplishment of the purpose stated. Otherwise Sec. 15a is meaningless. We doubt whether the Commission could exercise this discretion, without Sec. 15a, without taking into account its effect upon the adequacy of the carriers' revenues. Certainly it may not do so under 15a without taking into account the adequacy of such revenues as measured by the standards of Sec. 15a, for which it may not substitute some other. The duty imposed and the manner in which it is to be exercised exclude the right to substitute for the existing rates, whether already reasonable or unreasonably high, the lowest possible lawful rates, thus preventing the carriers *pro tanto* from receiving out of rates in themselves reasonable because in the zone of reasonableness, the fair rate of return which the statute contemplates. At such a time, or in the

absence of a specific finding that the carriers' rate of return exceeds, or is likely in the near future to exceed, the statutory rate of return, the Commission may not establish the lowest possible lawful rates, whatever power it may have to do so when the statutory rate of return is exceeded, or might have had prior to the enactment of Section 15a.

In *Reduced Rates, 1922,* 68 I. C. C. 676, and again in the recent *Fifteen Per Cent. Case, 1931* (*Ex parte 103*), 178 I. C. C. 539, the Commission pointed out that an advance in rates did not necessarily mean an increase in revenue and that a decrease in rates might increase revenue through increasing movement. Clearly, however, the Commission may not reduce rates on a substantial volume of traffic, at such a time and for such a reason, at a time when the rate of return is inadequate, in the absence of a specific finding that the effect of such reductions will be so to stimulate the movement of traffic as to at least preserve, if not increase, the net revenues of the carriers. While it is not our purpose in this part of the brief to deal with the facts, it is appropriate to point out the absence of any such finding in this case as the reason for failing to pursue further the argument in respect of this question.

4. Recapitulation of the true import of Section 15a and of its relation to the powers of the Commission under other sections of the Act.

It follows from the foregoing:

(1) Sec. 15a is not a mere permission to earn out of the aggregate of rates established a fair

return, if possible. It imposes upon the Commission the positive duty to establish such rates as to achieve such result as nearly as may be.

(2) The rate structure and the level of the rates to be established are to be determined by reference to the required rate of return, not by conclusions of the Commission independently thereof as to what is good for the country or the carriers, or what kind of a structure, in its opinion, is necessary for the maintenance of an adequate system of transportaiton.

(3) Sec. 15a becomes a part of the standards of Sec. 1, which must be read and applied with respect thereto. Sec. 15a therefore limits the Commission in the exercise of the powers theretofore conferred by Sec. 1 to the extent necessary for the achievement of the purpose of the former.

(4) Sec. 15a does not prohibit the Commission from reducing particular rates or classes of rates when clearly unreasonable, i.e., above the upper boundary of the zone of reasonableness. It does forbid the Commission, (in a case where the existing rates are above the upper boundary of the zone of reasonableness, just as much as in a case where the existing rates are within the zone of reasonableness), either to fix *all* rates at the lowest possible lawful level, thus preventing *all* possibility of achieving the statutory rate of return, or to fix the rates of any major description of traffic at the lowest possible lawful level, where

the effect is *pro tanto* to prevent the receipt of such return. The Commission may not, therefore, establish the lowest possible lawful rates on a substantial volume of traffic, where the carriers' rate of return is at the time inadequate, or in the absence of a specific finding that it exceeds or in the near future will exceed the statutory rate.

(5) The Commission may not establish the lowest possible lawful rates on a substantial volume of traffic upon the theory that such reductions will increase revenues by increasing movement, without a specific finding to that effect.

For the reasons hitherto set forth, the Commission may not consistently with the requirements of Section 15a establish the lowest possible lawful rates on a large volume of traffic affecting all the carriers in a given rate making group in the absence of a finding that the carriers' rate of return exceeded or was likely to exceed the statutory standard or at a time when it was below that standard. In this case the Commission did not make the former finding and it appears from the report that the carriers' rate of return was materially below that contemplated by Section 15a (R. 77). In thus establishing the lowest possible lawful rates, the Commission deprived the carriers of the opportunity to earn, as nearly as might be, out of rates themselves within the zone of reasonableness, the fair return thus contemplated. In so doing it not only failed to give proper consideration and effect to Section 15a but committed an affirmative breach of its duty thereunder. The duty imposed

by that section is a continuing duty. Of all of the positive duties imposed upon the Commission, it is the most important. The section by which that duty is imposed is the keystone of the existing system of railroad regulation.

Assuming that we are wrong, however, in all of the foregoing conclusions, it would seem clear that the Commission may not establish the lowest possible rates under the conditions recited, solely by reason of the existence of depression in the industry affected. It would seem equally plain that it could not do so in this case if its action was based either upon the assumption that the resolution made it its duty so to do, or if done out of deference to the supposed wishes of Congress, although not amounting to a command.

Since if its action, although otherwise within its powers, was violative of other provisions of the Act, as well as 15a, if based upon any of the three considerations stated, discussion of this question will be postponed until later.

5. The rates prescribed were prescribed as the lowest possible lawful rates.

Commissioner Meyer, whom the report shows to have been the Commissioner in immediate charge of the proceeding, said:

> "The rates prescribed lie within the zone of reasonableness, but they are the lowest rates on this traffic which can be lawfully prescribed" (R. 150).

Later on, answering the demand of certain interests for reduction in the export rates, the Commissioner says:

> "* * * But even if they had produced the desired effect we would still be without power to compel the railroads to publish them unless the rates fell within the zone of reasonableness. It is my understanding that many of these rates were established on a level below that zone. Whatever the facts may be in this regard, we are establishing herein rates as low as we can lawfully prescribe. * * *" (R. 153).

Commissioner Meyer thus twice characterized the rates prescribed as the lowest possible lawful rates. As the Commissioner in immediate charge of the case, and under whose jurisdiction the report was presumably prepared, Commissioner Meyer's statement must be taken to be properly descriptive of the nature and purpose of the action taken. They were so referred to by Commissioner Eastman as the rates which the Commission was "required" to make. That they were of the character stated is further evidenced by the doubts expressed by Commissioners Lewis and Woodlock as to whether they were sufficiently high to be permanent (R. 186, 187).

Neither the report itself nor the concurring opinion of any other commissioner asserts to the contrary. The court may consider either dissenting, or concurring opinions, for the purpose of determining the nature and basis of the Commission's action, particularly where there is nothing in the main report to the contrary. *Southern Pacific Co.* v. *United States*, 219 U. S. 433, 449; *St. Louis & O'Fallon Ry. Co.* v. *United States*, 279 U. S. 461, 485-486.

That they were properly so characterized is shown by the report as a whole and the severity of the reduction made (*ante* pp. 37, *et seq.*).

6. The action of the Commission may not be sustained by a reference to the phrase "as nearly as may be" which Sec. 15a contains.

It may be said, as was said below, that the expression "as nearly as may be" qualifies the duty imposed. It is believed that this phrase was inserted solely in recognition of the fact that the statutory rate of return could not be achieved with mathematical accuracy. Certainly it extends to the Commission no license to prescribe rates which will yield but a fraction of the percentage of return fixed by the Commission itself as the fair rate of return required by the Act to achieve its purpose. Assuming without conceding that this phrase was inserted also in recognition of the possibility that commercial conditions would render receipt of the full rate of return impossible, even this interpretation may not be successfully invoked in support of the order. The grain traffic moved freely under the existing rates. There was no practical obstacle to the retention of the existing revenues arising therefrom. Assuming, without conceding, that some of the rates were above the upper boundary of the zone of reasonableness or even that the general level was above such boundary, there was no justification in substituting for such rates the lowest possible lawful rates. The necessary effect was to establish rates lower than required to meet the requirements of a reason-

able and lawful rate and hence to deprive the carriers *pro tanto* of realizing as nearly as might be the statutory rate of return. To establish such rates is not to enable the carriers to earn such fair rate of return, "as nearly as may be", but to deprive them of the opportunity so to do.

7. The order of the Commission would have been void, if it had contained, which it did not, a specific finding that the rates were unfairly related to the rates on other traffic.

The Commission at the inception of its report stated that among the questions to be determined was whether the rates were properly related to the rates on other traffic (R. 77). In its previous decision, determined immediately prior to the adoption of the Hoch-Smith Resolution, it had held that they were (R. 399). The report in the present proceeding makes no finding to the contrary and contains no recitals of fact upon which such a finding could be based. Had it done so, the order of the Commission would still have been in disregard of the duties of the Commission under Section 15a, unless accompanied by a further finding that the rates on grain and grain products were so high as to cast an undue burden on the grain traffic as contrasted with other traffic *under a rate structure sufficient to yield a fair rate of return out of all traffic.* This proceeding was but part of a general investigation into the rate structure as a whole for the purpose of bringing the same into conformity with all provisions of the Act (R. 45). The carriers' rate of return was materially less than that required by Section 15a (R. 77). In order to bring the rate

structure as a whole into conformity with all provisions of the Act, it was therefore the duty of the Commission, in such general investigation, to adjust the same so as to produce, out of all the rates, the required rate of return. A finding, if made, that the grain traffic was contributing more than its fair share of the existing, but inadequate, revenues of the carriers would not have justified a reduction in the rates, or the establishment of the lowest possible lawful rates. The Commission would have been required to go farther and to find that, under the existing rates, the grain traffic was contributing more than its proper proportion of the revenues of the carrier under a rate structure which would produce a fair rate of return.

If, for example, the general level of the rates on grain was found to be the same as that on some other description of traffic moving in substantially the same volume, and if the Commission had specifically found that the rates on grain traffic, considered from the standpoint of the cost and value of the service, should be 10% less than on the other, and if, at the same time, it appeared that the carriers' gross revenues were insufficient by 10% to produce the fair return contemplated by Sec. 15a, the Commission obviously would not have been justified in requiring a reduction in the grain rates. Under such a state of facts the grain traffic would be contributing exactly that proportion of an adequate carrier revenue which it should produce.

The grain shipper is not interested in the relation between his rate and the rates paid on iron and steel articles as such, but only in the question as to whether he is contributing in a greater degree than he should to the support of the railroads. Whether he is or not must be

determined by the relation of his contribution to an adequate, not to a presently existing inadequate revenue when measured by Sec. 15a. He may have a direct interest in the relation between his rates and the rates on commodities, if any, with which he competes. Despite the inadequacy of existing revenues, the Commission may require a readjustment of one or the other in order to remove the resulting injury to the grain shipper. In such a case, however, if the grain traffic were not contributing more than its fair share to a proper aggregate revenue, it would appear to be the duty of the Commission to correct the existing discrimination by requiring an advance in the rates of those competing articles of commerce, which were contributing less than their fair share thereto.

A mere finding that the grain traffic's present contribution to the existing but inadequate revenues was proportionately larger than it should be, would not, if made, have warranted the Commission in reducing the rates, unless it was also prepared to find and did find that the grain traffic's contribution to existing revenues was larger than it should be called upon to contribute under a rate structure which would produce an adequate return. Otherwise the Commission, by measuring the relativity of such contribution and of the resulting burdens by the standard of an existing inadequate revenue, would be in the position of constantly diminishing both the rate of return and the opportunity to earn a fair return by the application of the wrong remedy. Under such circumstances the duty of the Commission to require an increase on the traffic which is not contributing its proper proportion of an adequate revenue is plain.

The existence of this duty the Commission clearly failed to perceive. Indeed, we believe that to a considerable degree the present inadequacy of the carriers' revenues is due to the failure of the Commission and perhaps of the carriers, as well, to recognize this self-evident proposition. Both the carriers and the Commission had become so accustomed, prior to the enactment of Sec. 15a to consider the *existing* relationship between rates on various descriptions of traffic, whether aggregate revenues were adequate or inadequate, that they both overlooked the true relation of Sec. 15a to such a case. The result is, as we believe, that many rates have been reduced by order of the Commission by reason of the relationship thereof to the rates on some other description of traffic without taking into account that such relationship, under Sec. 15a, afforded no proper measure of reasonableness, when the aggregate revenues from all traffic were inadequate. It might afford a basis for an order to remove discrimination between competing commodities but certainly it could not be employed for the other purpose.

In any event, since the Commission did not find that the grain traffic was contributing more than its fair proportion even of the existing inadequate revenues, it is unnecessary to pursue the subject further. For the reasons stated, we think it plain that such a finding, had it been made, would have been insufficient to sustain the order, unless coupled with the further finding that it was contributing more than its proper proportion of an adequate revenue. The report contains no such finding and no recital of facts which would have supported such a finding, if made.

V

THE COMMISSION'S MISCONSTRUCTION OF SECTION 15a AND OF THE EFFECT OF THE RESOLUTION UPON ITS DUTIES THEREUNDER APPEARS ON THE FACE OF THE REPORT.

1. The Commission either (a) erroneously construed Section 15a as being merely permissive and as permitting the Commission to substitute a standard of its own for the statutory standard established thereby, or (b) construed the resolution as discharging it in the proceeding before it from the the affirmative duty to impose generally by Section 15a.

At the inception of the report the Commission thus states the question presented:

"THE QUESTION OF A GENERAL RATE REDUCTION

"The question here presented is whether, under present conditions, the rates on grain and grain products throughout the western district are reasonable and just and are properly related to each other and to the rates on other traffic. The answer must take into account not only comparisons of distance, transportation conditions, and ton-mile and car-mile earnings on grain and other commodities, *but also whether the general level of rates on all traffic as a whole is sufficiently high to accord to the carriers the rate of return contemplated by law, including section 15a of the interstate commerce act, which we construe to permit, but not to guarantee, the carriers to earn 5.75 per cent on the fair value of the property devoted to*

the transportation service" (R. 77). (Italics ours.)

Section 15a while not a guaranty is more than a permission. It casts upon the Commission an affirmative duty to adjust and establish rates conformable thereto. The permissive right to earn a fair rate of return existed prior to its enactment. If the Commission's language is to be taken literally, it evinces a clear misconception of the general purpose of Section 15a and its relations with other provisions of the Act.

If the Commission meant to say that in this case as contrasted with one involving all rates, the section was permissive only in its effect because the Commission had been discharged by the Resolution from giving effect thereto in fixing the rates on agricultural products affected by depression, its position is equally untenable. The Resolution made no change in the basic law and did not discharge the Commission from the performance of any duty which prior to its enactment it was required to perform.

This proceeding was merely a part of a general inquiry into the entire rate structure in which it was the duty, among others, of the Commission to protect, preserve, and, if possible, increase the net revenues of the carriers, since they were already far below the standard prescribed. This duty rested upon the Commission in every part of this proceeding. Instead of recognizing the true relation of Section 15a to the general rate structure investigation and to every part of it, the Commission apparently proceeded upon the theory that the rates on the several descriptions of traffic involved in each of its

numerous subdivisions were to be independently considered, the net revenues of the carriers thus becoming whatever they might become under the aggregate of the rates thus established. The Commission in fact, as well as in words, thus construed Section 15a as merely permitting the carriers to earn a fair return, out of the rates then established, if they could get it, instead of making it the duty of the Commission to establish rates which would produce such return as nearly as might be, even though it may have been conscious, as were Commissioners Eastman, Lewis and Woodlock, that the resulting structure might have to be immediately revised again in order to meet the requirements of Section 15a (R. 186, 187). The case was an important one directly and materially affecting the aggregate revenues of the carriers, as well as being a part of a general inquiry into the entire rate structure. The language used was presumably advisedly chosen. That in such a proceeding the Commission could dismiss so cavalierly Sec. 15a and its meaning is sufficient to show that the Commission wholly misunderstood the effect of the duties imposed upon it by Section 15a on the issues presented.

At the conclusion of its report under the heading "General Comment", the Commission says:

> "The action here taken represents the fullest possible response to all the mandates of the law affecting, among other things, the important subjects of levels and relations of rates, the natural and proper development of the country as a whole, and the maintenance of an adequate system of transportation. The future volume of movement of wheat and other grains between specific points

> can not be accurately known. It follows that the revenue effects of the increases and decreases which will follow the effectiveness of our action herein cannot be precisely stated. We have made many different checks and estimates. *While the reductions far exceed the increases, and the corresponding revenue effects will be substantial,* the full effect upon revenues cannot be adequately foretold, in view of the limitations upon transit, the elimination of transit balances outbound from primary markets, and the greater safeguarding of revenues from wasteful competition that should follow the reduced level of rates. *We are satisfied that the readjustment will not threaten the maintenance of an adequate system of transportation"* (R. 147). (Italics ours.)

Similar language appears in the Commission's report in *California Growers' & Shippers' Protective League* v. *S. P. Co.*, 129 I. C. C. 25, 55, the order in which was set aside in *Ann Arbor R. Co.* v. *United States, supra.* In that report the Commission said:

> "* * * While all the defendants who handle the bulk of the deciduous-fruit traffic have not as yet made the fair return, their present financial condition is relatively strong. It seems clear that the reduction requested, if granted, would not affect the maintenance of adequate transportation service."

The words "the maintenance of an adequate system of transportation" employed by the Commission in both cases were lifted bodily from the third paragraph of the Hoch-Smith Resolution which reads:

> "In view of the existing depression in agriculture, the commission is hereby directed to effect with the least practicable delay such lawful changes in the rate structure of the country as will promote the freedom of movement by common carriers of the products of agriculture affected by that depression, including livestock, at the lowest possible lawful rates compatible with the maintenance of adequate transportation service * * *."

In setting aside the order of the Commission the Supreme Court said (281 U. S., at pp. 667-668):

> "The third paragraph was construed by the commission as making a change 'in the basic law,' as placing agricultural products in a 'most favored' class, and as justifying a reduction in the rates on deciduous fruits moving from California to eastern points, notwithstanding most of the carriers 'have not as yet made the fair return' *for which § 15a of the Interstate Commerce Act makes provision as a means of securing the maintenance of an adequate transportation system.*" (Italics ours.)

In this case as in that case the Commission was thus proceeding on the erroneous assumption that it was empowered, if not directed, to reduce the rates on agricultural products affected by the depression, notwithstanding, as appears from the report in this case and as was stated in the report in that case, that the carriers' rate of return was below that contemplated by Section 15a, provided only the Commission was of the opinion that the reductions required would not threaten the maintenance of an adequate system of transportation.

Among the mandates to which the order is said to be fully responsive is that requiring "the maintenance of an adequate transportation system". The order is said to be fully responsive to that mandate because, although the revenue effects will be substantial, the Commission is "satisfied that the readjustment will not threaten the maintenance of an adequate system of transportation". In so stating the Commission could not have intended to say that the action taken was fully responsive to the mandate imposed by Sec. 15a, adopted by Congress as the means by which the maintenance of an adequate system of transportation was to be insured, since it appeared from the report that the carriers' rate of return was already far below the standard of that section.

If the language employed was intended to be descriptive of the Commission's interpretation of the general mandate imposed by Section 15a, it clearly erred. This error lay in failing to perceive what is made clear by the foregoing excerpt from the opinion of the Court, namely, the distinction between the maintenance of an adequate system of transportation, as the *end* sought to be attained by Section 15a, and the provision made therein by Congress itself as the *means* by which such end was to be attained.

The effect of such an interpretation would be wrongfully to substitute for the Congressional standard and the Congressional means of its attainment others of the Commission's own creation (*supra*, p. 88 *et seq.*) The only permissible alternative is that the Commission proceeded upon the assumption that, in respect of the establishment of rates on agricultural products affected

by depression, it was relieved of its duty to consider and give effect to the requirements of Section 15a, if, merely, it was of the opinion that the readjustment ordered would not affect the maintenance of an adequate transportation system. The only possible basis for this explanation is the third paragraph of the Hoch-Smith Resolution. But the Hoch-Smith Resolution made no change in the basic law. *Ann Arbor R. Co.* v. *U. S., supra.* It therefore did not discharge the Commission from the duty to give effect to the requirements of Sec. 15a in any case in which it was required to give the same effect prior to the adoption of the resolution, as the Commission itself had done in its previous report in respect of the same subject matter prior to such adoption. The reference in the foregoing excerpt, from the opinion of this Court in *Ann Arbor R. Co.* v. *United States, supra,* to Sec. 15a, moreover, makes it plain that among the provisions of the Act, to which the Commission must give proper effect in establishing the rates on agricultural products, although affected by depression, is Sec. 15a. The adoption of the Resolution did not, as had been erroneously assumed by the Commission, establish such agriculture as a favored class, freed from the application of any part of the basic law governing generally the determination of rates, or the powers and duties of the Commission. Either interpretation of the Commission's language is equally fatal to the validity of the order.

The second of the two permissible explanations is the most likely. The review hitherto made of the report as a whole and of the action of the Commission (pp. 37 *et seq. ante*) makes it plain that the Commission proceeded

upon the theory that by reason of the Hoch-Smith Resolution it was its duty to establish the lowest possible lawful rates on the products in question, irrespective of their effect upon the carriers' rate of return. This theory, implicit in the foregoing excerpt from the main report (*infra*, p. 140, *et seq.*), is given explicit expression in the concurring opinion of Commissioner Eastman, who said:

> "Throughout this proceeding the Hoch-Smith Resolution has been emphasized. In a situation like that which is here presented, that resolution makes it our duty to prescribe the 'lowest possible lawful rates compatible with the maintenance of adequate transportation service.'" (R. 168).

The reference in the main report to the "maintenance of adequate transportation service" as among the mandates of the law, and the statement (R. 147) that such mandate had been fully complied with because the Commission was satisfied that the readjustment would not threaten the maintenance of such a system, is but another way of expressing the conclusion stated by Mr. Eastman. None of the seven other Commisioners filing concurring opinions, dissented from the view thus expressed (R. 148 *et seq.*).

2. The Commission, if it did not wholly misconceive its duties under Sec. 15a, proceeded upon the erroneous assumption that, because of the resolution, it was directed to establish the lowest possible lawful rates in this proceeding, although at or after the conclusion of the general investigation, of which it was a part, it might be required to advance the general level of all rates, including grain rates, in order to discharge the duty imposed by Sec. 15a.

Commissioner Eastman, after declaring it to be the duty of the Commission under the resolution to establish the lowest possible lawful rates *in the present proceeding* (R. 168), recognizes the fact that, unless other sources of increased revenue could be found in other parts of the proceeding, the Commission might be required to increase the rates on grain and grain products now reduced in order to comply with Section 15a (R. 172). This is equivalent to saying that, *because of the resolution*, the Commission was discharged from giving effect to Section 15a *in this proceeding*, whatever the effect of the action taken thereon and, although but for the resolution it would have been required to do so *now*.

Commissioner Lewis expressed the opinion "that the level herein prescribed is probably too low to be permanent" (R. 186).

Commissioner Woodlock was gravely apprehensive of the revenue effects of the order and expressed the opinion that if the rates prescribed were "to remain long in effect * * * they will produce a situation which will require emergency remedies if we are to maintain in

that territory an adequate system of transportation" (R. 187).

It is stated in the main report that the revenue losses would be substantial (R. 148). It appears from the report that the existing rate of return was grossly inadequate. It must, therefore, have been plain to the whole Commission, as well as to the three Commissioners named, that to meet the requirements of Section 15a, the rates prescribed would probably have to be advanced in the future. In fact, the main report itself refers to such a possibility by saying that the action taken was taken "in the realization that a failure of the present revision to afford adequate revenue will prompt further proceedings" (R. 148).

If the existing rate of return had been adequate or nearly so, there might have been some excuse for such a course. Under the circumstances, it was based upon the belief that in the present proceeding the Commission was under a mandate, supposed to have been created by the Resolution, to prescribe the lowest possible lawful rates on agricultural products affected by depression, irrespective of the existing inadequacy of the rate of return, and to postpone giving effect to the express mandate of Section 15a until a later time.

Instead of awaiting such conclusion, the Commission proceeds to reduce the rates to the lowest possible lawful basis, and thus deprive the carriers *pro tanto* of an opportunity to earn the statutory rate of return. The Commission may not thus play fast and loose with the carriers' revenues. If, after the conclusion of the general investigation as a whole, the Commission was in a posi-

tion to find that the readjustments made therein would produce a rate of return in excess of the statutory standing, it might conceivably at that time have readjusted the rates on certain descriptions of traffic, including grain. Clearly it was without authority to establish the lowest possible lawful rates upon a mere hope that, despite the resulting reductions in revenue, the carriers, through the future adjustment of some other rates, not then determined or capable of being known, might, achieve the fair return which was then lacking.

The soundness of the conclusions stated may be tested by considering the effect, if the Commission had proceeded, in each of the several parts of the general investigation, to establish the lowest possible lawful rates on each description of traffic as they came under review. The obvious result would be that, at the conclusion of the investigation as a whole, the carriers' revenues would have been inadequate to meet the requirements of Section 15a and the Commission would have been required immediately to advance the general level of all the rates thus established. This it would have been required to do, either by a horizontal advance in all, or through another additional protracted investigation, conducted for the purpose of determining how the increased revenue required should be distributed among the several descriptions of traffic. The latter course, if undertaken, without doubt would require several years to complete.

In the meantime, the carriers would be prevented from any opportunity to earn the contemplated rate of return by reason of the action taken by the Commission. This effect would be brought about by action of the Commission in ignoring Sec. 15a throughout the general in

vestigation. But if it was permitted to ignore it in one part thereof, it was permitted to ignore it in all parts. Such could not have been the view of the Commission either of its powers or of its duty. The only other explanation is that it believed itself to be required by the resolution, as it had previously said it was, and as Commissioner Eastman in his concurring opinion said it was, to ignore Sec. 15a in establishing the rates on agricultural products provided *only* it was of the opinion that the reductions made would not immediately threaten the maintenance of an adequate system of transportation. The resolution had no such effect.

Moreover, the foregoing statement of the effect, if the Commission had proceeded similarly in all other parts of the general investigation, should be sufficient in itself to establish the error of the Commission's contention that it is, at all times, empowered, under the Interstate Commerce Act, to establish "the lowest possible rates" on any description of traffic, irrespective of the adequacy or inadequacy of the existing rate of return, or of the effect of the action taken thereon.

This proceeding was but a part of a general investigation into the rate structure as a whole (R. 45, 69). This investigation was instituted by the Commission pursuant to the second paragraph of the Hoch-Smith Resolution (R. 76). The purpose of this investigation was to bring the rate structure as a whole, so far as possible, into conformity with all provisions of the Interstate Commerce Act. To borrow an expression from the Commission's report, the Commission was required therein to respond to all of its mandates. Among those mandates is that contained in Section 15a (R. 77). It was therefore the duty of the Commis-

sion in this proceeding to consider the rate structure as a whole in relation to the requirements of that section and to provide at its termination, so far as might be, a rate structure which would yield the rate of return contemplated by such section. No general investigation into the rate structure as a whole, which falls short of accomplishing this purpose, is responsive to the requirements of the Act or the duties of the Commission.

The duty thus imposed rested upon the Commission in all parts of the proceeding. The Resolution did not discharge it from such duty.

The Commission was without doubt empowered in such proceeding, or in any part of it, to establish maximum reasonable rates by reductions, if necessary. While thus empowered, it was without authority to establish the lowest possible lawful rates either on agricultural products, or anything else, until it was prepared to find either that the existing rate structure as a whole yielded a rate of return in excess of the statutory standard, or until it had established such a rate structure as would yield such rate of return. It did not and could not make either finding. The first, if made, would have been contrary to the facts recited in the opinion, while the second could not, of course, be made until the investigation as a whole had been completed.

3. That the Commission so proceeded affords the only reasonable explanation of the treatment accorded to the carriers successive efforts to secure a postponement of the order and a rehearing.

That the Commission considered itself discharged from giving effect to Section 15a, provided only that it

was satisfied that the reductions ordered would not immediately threaten the maintenance of an adequate system of transportation, is further evidenced by its action upon the carriers' successive petitions for rehearing. The record was closed in September 1928 (R. 8). The last full year of operation preceding was the calendar year 1927. The order was entered July 1, 1930. Its effective date was thereafter postponed from time to time because of the mechanical difficulties involved in the preparation and printing of the numerous tariffs containing the hundreds of thousands of rates to be revised (R. 280). Between the close of the record and the date of the order, conditions so materially changed that the record upon which the order was based had ceased to become representative of existing conditions.

The powers of the Commission under Section 1, and its duties under Section 15a are both of a continuing character. The orders of the Commission are supposed to be and should be responsive to the present conditions and those of the immediate future, not to those of the past. This the Commission itself recognized in *Reduced Rates 1922, supra,* wherein it ordered a general reduction of 10% in all rates at a time when the revenues of the carriers were far below the statutory requirement and because of its prophecy in respect of the immediate future. Both petitions for rehearing were submitted before the order had become effective.

In the carriers' second petition for rehearing the attention of the Commission was called to the fact that their rate of return had declined from 3.83% in 1927 to 3.10% in 1930 and that their current rate of return was

even lower by reason of the continuing decline in the volume of traffic handled (R. 518). This petition for rehearing further alleged that by reason of such decline in net railway operating income the retention of their bonds as approved investments for savings banks and insurance companies had been placed in jeopardy and their credit had already become seriously impaired (R. 529). These facts the carriers offered to prove if a rehearing were granted (R. 511). The petition was denied by the Commission 13 days after it was filed (R. 39).

It is difficult to understand how, if the facts alleged were true, the Commission could still adhere to its conclusion that a further reduction in the carriers' revenues, estimated by a concurring Commissioner at $15,000,000 or more (R. 187), and by the carriers in their petition at $20,000,000 (R. 18), would not threaten the maintenance of an adequate system of transportation. Since the Commission had also found that the benefit to the producer, if any, would be speculative, while the effect upon the carriers would be immediate and severe (R. 93), it is also difficult to understand how the denial of the petition for rehearing can be reconciled either with the previously expressed conclusion or with the continuing duty of the Commission under Section 15a. The only rational explanation of this action, unless it be deemed to be purely arbitrary, was that the Commission, as indicated by the foregoing excerpts from its report, was proceeding upon the theory either that it was relieved from its duties under Section 15a in respect of the rates on agricultural products, affected by depression, or that Section 15a was merely permissive in its effect and in reality cast no positive affirmative duty upon the Commission.

VI

THE COMMISSION EXCEEDED THE POWER CONFERRED BY SECTIONS 1 AND 15 AND APPLIED A STANDARD OTHER THAN AND DIFFERENT FROM THE STANDARDS OF SAID SECTIONS.

If it be true, as we believe, that Section 15a qualifies Section 1, then it is clear that in establishing the lowest possible lawful rates on grain and grain products in the absence of a finding that the carriers' rate of return exceeded the statutory standard and at a time when, on the contrary, it was materially less, the Commission exceeded the authority conferred by Section 1, as well as acted in disregard of Section 15a.

There are other reasons why in so doing it exceeded the power conferred by Sections 1 and 15.

1. The carriers were ordered not to charge rates to exceed those prescribed by the Commission. The rates were therefore prescribed as maximum reasonable rates, not as minimum rates.

Section 1 declares that all rates shall be just and reasonable.

Section 15(1) authorizes the Commission to fix either maximum, absolute, or minimum rates. The prescription of a maximum rate prohibits the carrier from charging any more, but permits it to charge less. The fixing of a minimum rate precludes the carrier from charging any less, but leaves it free to charge more. The prescription of an absolute rate precludes the carrier from charging

either more or less. In the court below counsel for the United States, the statutory defendant, conceding that the rates established were established as the lowest possible lawful rates, argued that the Commission was empowered so to do by Section 15(1), which empowers it to prescribe minimum as well as maximum rates. Such he says was the power exercised in this case. The difficulty with this argument is that, as appears from the order, the rates were prescribed as maximum reasonable rates and not as minimum rates.

The order of the Commission requires the establishment of rates "which shall not *exceed* those prescribed in Appendix D of said report" (R. 273; italics ours). The power which the Commission exercised in this case, therefore, was not the power to fix a minimum rate, but the power to prescribe a maximum rate. If the Commission had exercised the former power and not the latter, the result would have been that the carriers would have been required to increase all the rates which are below those prescribed as minimum and would not have been required to reduce any rates which are in excess of such minimum. In such circumstances, it is safe to assert that this proceeding would never have been brought.

2. The exercise of the power to prescribe a minimum rate is the exercise of the power to prescribe the lowest possible lawful rate, i.e., one below which the carrier may not lawfully go. It may not at the same time be the standard of a maximum rate.

The power to prescribe the minimum rate was conferred in order to authorize the Commission to prevent

the carrier from making an unreasonably low rate, *i.e.*, a rate below the lowest possible lawful rate.

This was added as an amendment to Section 15(1) by Section 412 of the Transportation Act, 1920. In its Thirty-third Annual Report to Congress, dated December 1, 1919, the Commission made the following recommendation (p. 4):

> "Under the policy theretofore followed by our Government all efforts to restrict the full play of competition between carriers have been frowned upon or prohibited. Obviously competition between carriers that is wasteful or unnecessarily expensive lays an added burden upon the ratepayers. Elimination of wasteful or unduly expensive competition in rates or service is desirable and under the exercise by the Government of its power to regulate the service and the rates which the carriers may charge and to require an abatement of all unjustly discriminatory, unduly prejudicial, or unduly preferential charges, regulations, or practices, carriers might well be permitted and encouraged to coordinate their activities and merge or consolidate their lines to such an extent as is, after thorough investigation and full hearing, sanctioned by the regulating body. The rates should not be higher than the shipper may reasonably be required to pay and should not be lower than the carrier may reasonably be required to accept. The regulating tribunal should have authority to prescribe not only the ***maximum*** which the carrier may charge, but also the ***minimum.*** This power would restrain an individual carrier from furthering its own ends at the expense of others by unwise and unwarranted upsetting of reasonable rate adjustments. If the

rates and charges are by regulation confined within the reasonably narrow limits between the maximum and minimum reasonable charges, no public interest can be injured by the carriers all maintaining charges within those limits."

In reporting favorably upon the Transportation Act, the House Committee (House Report No. 456, dated November 10, 1919) said:

"MINIMUM AND MAXIMUM RATES.

"Under section 412 the commission is authorized to fix minimum as well as maximum rates. Under the Interstate Commerce act the commission ever since 1887 has only been empowered to declare the maximum rate to be charged. As a result of the testimony the committee believes that the commission should also be granted authority to prescribe joint rates, or maximum, or minimum, or maximum and minimum joint rates. With this power the commission could prevent a rail carrier from reducing a rate out of proportion to the cost of service, by establishing a minimum, below which such carrier could not fix its rate. It would also prevent a rail carrier from destroying water competition between competitive points by prohibiting such carrier from so reducing its rates as to destroy its water competitor. Circumstances have been cited where the rail carrier destroyed its water competitor by such a reduction of rates as to make it impossible for the water carrier to survive. When once competition was thus driven off the rail rates would be restored or would rise to even higher levels. The power to fix minimum rates will also enable the commission to adjust many cases under the fourth sec-

tion of the Commerce act, known as the 'long and short haul clause.' "

The power to prescribe the lowest possible lawful rate is therefore the power exercised when the Commission prescribes a minimum rate, a rate below which any other rate becomes unlawful. The carrier may, however, charge as much more as it pleases so long as it does not exceed a maximum reasonable rate. Manifestly, the lowest possible lawful rate may not at the same time be the standard by which the highest as well as the lowest rates which the carrier may make is to be determined.

3. The lowest possible lawful rate may not be used as the measure for the determination of maximum reasonable rates.

(A) COUNSEL FOR THE COMMISSION IN THE COURT BELOW CONCEDED THAT IT COULD NOT BE MADE THE MEASURE OF DETERMINING THE LAWFULNESS OF EXISTING RATES.

In the Court below counsel for the Commission conceded that, if the existing rates were reasonable, the Commission was without power to reduce them, i. e., to reduce them to a lower point in the zone of reasonableness and hence to the lowest possible lawful rate. This, it is apparent, is equivalent to saying that the "lowest possible lawful rate" standard could not be employed to measure the reasonableness of existing rates. They asserted, however, that the Commission, having found the existing rates to be unreasonable, was empowered to establish in

lieu thereof the lowest posible lawful rates, although it would have been compelled to leave any existing rate, which was the highest possible lawful rate, in effect.

(B) NEITHER MAY IT BE MADE THE MEASURE FOR DETERMINING THE MAXIMUM RATES TO BE ESTABLISHED IN LIEU OF THOSE FOUND TO EXCEED SUCH MAXIMUM.

In other words, the argument for the Commission was that, while the Commission could not measure the reasonableness of existing rates by the "lowest possible lawful rate" standard, it could measure the reasonableness of the rates to be established in lieu thereof by such standard. We confess to be unable to understand the distinction.

In *Ann Arbor R. Co.* v. *United States, supra,* the order of the Commission was set aside because the Commission measured the reasonableness of the rates involved, and fixed the new rates prescribed by it, by the application of standards and tests other than and different from those prescribed by the Interstate Commerce Act. The measure therein employed was that of the "lowest possible lawful rate". It may be that the opinion of the Court emphasizes the application of this standard to the determination of the reasonableness of the existing rates, but it would seem to be plain that if it constitutes an improper measure of such rates it likewise constitutes an improper measure for the determination of the new rates to be prescribed by the Commission. It is inconceivable that there may at the same time be two standards, one by which existing rates are to be measured, and the other by which new rates to be prescribed are to be measured.

The very fact that the power exercised was the power to establish maximum rates makes it conclusive on the face of the report itself that the Commission employed an erroneous standard in the exercise of such power. The establishment of the "lowest possible lawful rate" as the "maximum reasonable rate" is in itself a contradiction of terms. The lowest possible lawful rate can never be the maximum reasonable rate. For this we need no other authority than the Commission itself which has said that there may at the same time be a figure representing a highest possible lawful rate and a lowest possible lawful rate. The Commission in employing the lowest possible lawful rate as the standard for the fixation of maximum reasonable rates, employed a standard which under the very language of the statute itself is inconsistent with the determination of a maximum reasonable rate. It could not have made the rates any lower than it did if it had been establishing a minimum rate.

As we have already pointed out (*supra*, p. 61), the Commission itself distinguished between a maximum reasonable rate and the lowest possible lawful rate in *Muller* v. *Pere Marquette R. R. Co., supra,* and in *South Carolina Produce Association* v. *Aberdeen R. Co., supra.* The former, it said, was of necessity lower than the latter. These cases also illustrate the absurdity of the argument that, while the Commission may not reduce any rate not now higher than a maximum reasonable rate to the level of the lowest possible lawful rate, it may reduce any rate which now exceeds a maximum reasonable rate to such level.

Under this argument the Commission was without authority to make any reduction in the *Muller* case be-

cause it had found that the existing rate did not exceed the reasonable maximum rate. Under the theory now propounded, however, if the rate had been 45¢ instead of 44¢, the Commission would have been empowered to reduce it to any point in the zone which it chose, including the lowest point. The argument, in other words, is, that while the Commission may not touch a rate which does not exceed a maximum reasonable rate, if it does exceed it, it may reduce it below the very standard, by which it is bound in passing upon the reasonableness of the existing rate. There is, therefore, one standard by which to determine whether the *existing* rate is a maximum reasonable rate, and another by which to determine the *future* rate. But the problem is the same in either case, viz., what is a maximum reasonable rate. Clearly, the standard must be the same in both cases, and in neither case may it be that of the lowest possible lawful rate.

4. It appears from the report as a whole, as well as from the action taken, that the reasonableness and lawfulness of existing rates, as well as those prescribed for the future, were measured by comparison with the lowest possible lawful rates, referred to in the resolution. In so doing the Commission applied a standard, the use of which was erroneously supposed by it to be required by the resolution, and which but for the resolution it would not have been required to employ.

The ultimate finding upon which the appellees rely is that the existing rates exceed reasonable rates to the extent that they exceed those prescribed (R. 111). It is

upon this ultimate finding that the order is based. By the very finding relied on to support the order the Commission measured the extent by which the existing rates exceeded lawful rates by the same standard employed in prescribing rates for the future. It is by the amount of this excess that the existing rates are declared to be unreasonable. It was by the deduction of the excess that the rates prescribed were determined. Nor is this a mere play on words. It was the only rational and orderly course to pursue, viz.: first to define the standard, next to measure the lawfulness of the existing rates by such standard, and then to reduce any that exceeded it by the extent of the excess. This is precisely what the Commission, in the finding relied on, says it did.

What was the standard used? It was that of the "lowest possible lawful rates" referred to in the resolution. This phrase owes its origin to the Hoch-Smith Resolution and appears therein for the first time in the literature of rate-making. It is immaterial, whether independently of the resolution, the Commission was authorized to employ it or not. No provision of the Interstate Commerce Act *required* its use. No provision of the Interstate Commerce Act made any rate "unlawful" because it exceeded the lowest possible lawful rate. The Commission acted as it did under the supposed compulsion of the resolution to prescribe such rates on agricultural products affected by depression. Consequently it determined the reasonableness and lawfulness of the rates, existing and proposed, in the light of the supposed purpose and requirements of the resolution. By so doing it applied a standard of lawfulness, supposed to be contained therein, which but for the resolution it would not

have been required to apply. This is precisely the error by reason of which its order was set aside in *Ann Arbor R. Co.* v. *U. S.*, *supra*. In other words, its error in that case was in supposing that the resolution required the Commission to do something, which it would not have been required to do otherwise, and had the effect of rendering unlawful rates which, but for the resolution, would be lawful. The Commission, therefore, employed standards other than those which it was required to employ by the Interstate Commerce Act.

We think it also, as in the *Ann Arbor* case, applied a different standard. Certainly it did so, if as stated by Mr. Eastman the words "just and reasonable rate" must be read in the light of the resolution (R. 172). This can only mean that when so read, they have a different meaning from what they have in the act when read apart from the resolution.

That the Commission used the standard, referred to in the resolution, in determining the lawfulness of the existing rates as well as in the prescription of new ones also appears from the action taken. The general level of the rates, approved immediately prior to the adoption of the resolution is reduced 13%. This reduction is unaccompanied by any discussion whatsoever of the standards customarily employed under the Interstate Commerce Act. Rates prescribed as reasonable maximum rates during the pendency of the proceeding, subject only to a reserved jurisdiction to determine whether they are also the lowest possible lawful rates prescribed in the resolution, are reduced in substantially the same percentage. A scale of maximum reasonable rates, made during the pendency of the resolution, for application over the entire

Southwest, after the most careful consideration, is materially reduced. A rate previously established as a minimum rate is reduced more than 50%, and one under which Fourth Section relief had been accorded, by more than 33-1/3%. Proportional rates, concededly among those commonly denominated "depressed" rates, are reduced on an average of 30%. All these rates could not have become unreasonable overnight under the standards of the Interstate Commerce Act. The Commission clearly applied thereto, as well as in the prescription of the new rates, a standard of conduct supposed to have been created by the resolution under whose supposed compulsion the reductions were made.

The Commission thus committed the same error as in *Ann Arbor R. Co.* v. *U. S., supra,* by applying to the rates on agricultural products standards and tests of lawfulness supposed to have been created by the resolution. Whether, except for its compulsion, the Commission would have acted as it did, does not appear. That it would not may be fairly inferred from the relation of its action to the action previously taken, in the cases enumerated, before the compulsion erroneously presumed to arise from the resolution.

We think the Commission also committed the further error, as in the *Ann Arbor* case, of applying a different and lower standard than that of the Interstate Commerce Act. Such would appear to be the only explanation of the drastic character of the reductions made. To take a single illustration, to wit, the reduction of the proportional rate of 23½¢ from St. Louis to Little Rock, which had been fixed by the Commission as a *minimum*

rate, to 10¢ (R. 26, 244). It is inconceivable that a rate so fixed could, under any circumstances, have become such as to be more than double a reasonable rate under the standards of the Interstate Commerce Act. Nor is this an isolated rate. Reference to table in Appendix D (R. 244), containing the present and prescribed proportional rates, shows how uniform were the reductions therein and the extent to which the general scheme of proportional rates was fitted with the rate from St. Louis to Little Rock, not only to the entire South and Southwest but to all of the proportionals. These proportional rates were among the most important rates fixed. In reducing a rate theretofore prescribed as a minimum rate by more than 50%, the Commission could not have been employing the standards of the Interstate Commerce Act but must have been employing other and lower standards erroneously supposed by it, as in the *Ann Arbor* case, to have been created by the resolution. The probable explanation of this error lies in the fact that the Commission had conducted this investigation from the time of its inauguration up to 30 days before the decision of the Court in the *Ann Arbor* case, and had had it under submission for eleven months prior thereto, while proceeding on the misapprehension of the effect of the resolution upon the standards to be used, involved in the *Ann Arbor* case (R. 21). Within the intervening period it did not fully perceive the effect of that decision and thus committed error (p. 145, *post*).

VII

ASSUMING THAT THE COMMISSION MAY, IN A PROPER CASE, ESTABLISH THE LOWEST POSSIBLE LAWFUL RATES, IRRESPECTIVE OF THE CARRIERS' RATE OF RETURN, THIS IS NOT SUCH A CASE.

1. The Commission is not empowered by the Act to establish the lowest possible lawful rates, because of a depression in the industry affected, and certainly not at a time when the carriers' rate of return is far below the statutory standard.

The action taken was taken by reason of the depressed condition of agriculture. In the next previous grain case of general scope (*Rates and Charges on Grain and Grain Products,* R. 341), and prior to the adoption of the resolution, the Commission, despite such depression, had refused to reduce the rates. In that case it had said that while the depressed condition of the industry might be taken into account in considering the value of the service, it could not itself be made the basis for a reduction in rates:

> "In considering the reasonableness of rates the economic condition of an industry may be relevant as it bears on the value of the service to the industry, and as it may be permanently or for a long period of time affect the ability of that industry to pay the rates assessed, but taken by itself it cannot be accepted as controlling" (R. 379).

In *Southern Pacific Co.* v. *Interstate Commerce Commission, supra,* the Court held, prior to the enactment of

Sec. 15a, that while every shipper was entitled to a reasonable rate, the Commission could not reduce existing rates in order to protect the investment of the shipper or by reason of his supposed necessities.

In *Ann Arbor* v. *United States,* speaking of the words which the resolution contains, "at the lowest possible lawful rates compatible with the maintenance of adequate transportation service", the Court said:

> "Considering the connection in which these words are brought into the sentence, we think they fall much short of supporting the construction adopted by the commission. They are more in the nature of a hopeful characterization of an object deemed desirable if, and in so far as, it may be attainable, than of a rule intended to control rate making. See *United States* v. *New York Central R. R. Co.,* 263 U. S. 603. Of course they should not lightly be disregarded. Neither should they lightly be accepted as overturning positive and unambiguous provisions constituting part of a system of laws reflecting a settled legislative policy, such as the Interstate Commerce Act. If they mean no more than that the depressed condition of the industry is to be given such consideration as may be reasonable considering the nature and cost of the transportation service and the need for maintaining an adequate transportation system, they work no change in the existing law. * * *" (pp. 668-669).

Earlier in the opinion the Court had said:

> "The third paragraph was construed by the commission as making a change 'in the basic law,

> as placing agricultural products in a 'most favored' class, and as justifying a reduction in the rates on deciduous fruits moving from California to eastern points, notwithstanding most of the carriers 'have not as yet made the fair return' for which § 15a of the Interstate Commerce Act makes provision as a means of securing the maintenance of an adequate transportation system. * * * " (pp. 667-668).

In the first excerpt quoted the reference to the "need for maintaining an adequate transportation system" must be read in connection with the prior passage as having reference to the provisions of Sec. 15a. The Court thus made it plain that since the enactment of Sec. 15a the right of the Commission to take the depressed condition of industry into account is further limited by the requirements of that section.

Moreover, although in this case the Commission found that the condition of agriculture was depressed (R. 77), it also found that the benefit, if any, to the producer from a reduction in rates was more or less speculative (R. 93). Nor was the order predicated on any finding in respect of the cost of the service. If it had been it would still have been void because of the failure to give effect to Section 15a. The order was based solely upon the depressed condition of the industry. In so doing the Commission exceeded the powers conferred by Sec. 1 by giving to such condition controlling weight, and violated the duty imposed by Sec. 15a in failing to give proper weight to its requirements.

2. The resolution did not make it the duty of the Commission so to do. Nor may the order be sustained, if made out of deference to the supposed wishes of Congress, expressed therein, but not amounting to a direction.

It is, we think, apparent that the Commission was induced so to do by reason of a duty supposed to have been imposed by the resolution. The resolution imposed no such duty, as is made evident from the foregoing excerpt from this Court's opinion. The words employed, as stated by the court, were "more in the nature of a hopeful characterization of an object deemed desirable" than of a rule of conduct. The Court refers to *United States* v. *N. Y. Central R.R. Co.*, 263 U. S. 603. Commissioner Eastman said the duty remained, despite the decision of this Court in the *Ann Arbor* case (R. 168). Whether the Commission as a whole concurred, or acted out of deference to the supposed hopes and desires of Congress is immaterial. In either event the order is equally bad. *United States* v. *N. Y. Central R.R. Co., supra.* Assuming that the Commission may have the power asserted, it may not exercise it out of mistaken deference to a supposed wish of Congress. When so exercised it ceases to represent the administrative judgment of the Commission. The action in the previous case, as contrasted with the action here, makes it plain that the reductions required to be made were made by reason of the resolution and not independently thereof. That such was the impelling cause appears from a consideration of the report as a whole and of all other pertinent facts.

Even though, contrary to the arguments herein made, the Commission is possessed of the power asserted,

viz., to establish the lowest possible lawful rates in the exercise of the powers conferred by Sections 1 and 15, such power was not lawfully exercised in this case.

3. The Commission's error arose from its failure to perceive the conflict between the conception of its powers and duties, under which it acted, and the decision in *Ann Arbor R. Co.* v. *United States*, as evidenced by the interpretation placed upon that decision in the concurring opinion of Commissioner Eastman, which contains the only extended review of the applicable law to be found in the report.

To our minds the conception of power and duty under which the Commission acted is plainly in conflict with the decision in *Ann Arbor R. Co.* v. *U. S., supra.*

As intelligent a man as Commissioner Eastman, however, saw no conflict between the two. On the contrary, he said that such conception was wholly consistent with the decision of the Court. He quotes with approval the Commission's interpretation in *Rates on Grain and Grain Products, supra,* in which the Commission said:

> "It sets no new standard of lawfulness, but provides, in effect, that to the extent that there are flexible limits to our discretion, we shall *require* the maintenance of the lowest rates falling within those flexible limits. Rates that may lawfully be required must in principle be high enough to cover all of the cost that may fairly be allocated to the service plus at least some margin of profit. * * * The substance of the provision of the resolution quoted above is that agricultural

> products affected by depression shall in this respect *be included in the class of most favored commodities, to such extent, at least, as may be 'compatible with the maintenance of adequate transportation service.'*" (R. 169, italics ours.)

He then said:

> "In my judgment this interpretation is entirely consistent with the provisions of the interstate commerce act, although it may be that for the sake of clarity we should have used the words 'some substantial margin of profit.'"

This explains his earlier statement that

> "In a situation like that which is here presented [meaning, obviously, where the products involved are agricultural products shown to be affected by depression], that resolution makes it our duty to prescribe the lowest possible lawful rates compatible with the maintenance of an adequate transportation service" (R. 168).

Under such conception, as stated, but two questions were presented for determination, first, were the products in question so affected, and second, what were the "lowest possible lawful rates?"

The Commissioner points out that he dissented in *California Growers & Shippers Protective League* v. *S. P. Co., supra,* because he thought the rates prescribed were lower than the lowest possible lawful rates. The Commissioner, therefore, saw in the opinion of the Court but an affirmance of his view, theretofore expressed, that in determining the lowest possible lawful rates, the Com-

mission was not to use standards other than those of the Interstate Commerce Act. What he failed to perceive was that the Court, in addition, held that the resolution did not control the discretion of the Commission or *make it its duty* to establish the lowest possible lawful rates on agricultural products, even though found to be affected by depression.

None of the numerous Commissioners filing concurring opinions disagreed with the views expressed by Commissioner Eastman, which were but a restatement of a interpretation placed upon the resolution by the whole Commission originally.

Mr. Eastman, in his concurring opinion, and the Commission itself in the report, from which he quotes, also failed to perceive that the very purpose of Sec. 15a is to prevent the Commission from exercising "the flexible limits" of its "discretion" so as to prescribe "the lowest rates falling within such limits" at a time when the carriers' rate of return is inadequate, particularly when such action is based solely upon the existence of depression in the industry affected. This, we think, is also made plain by the decision in *Ann Arbor R. Co.* v. *U. S.*, but if not, it clearly follows from both the phraseology and the purpose of Sec. 15a. As we have said, the purpose of that section is to require the Commission, in the exercise of its powers to establish reasonable rates (*i.e.*, in the exercise of the flexible limits of its discretion, theretofore conferred by Sections 1 and 15), to exercise such discretion, within those limits, so as to produce out of the aggregate of all rates so fixed, a fair rate of return, as nearly as may be. This, for the reasons stated, clearly

excludes the right at such a time to make "the lowest rates" permissible under an unrestrained exercise of such discretionary power.

Nor is it surprising if the Commission failed to perceive the full effect of the Court's decision in the thirty-days intervening between its rendition and the entry of the order and thus to conform the latter thereto. This proceeding was instituted under the Hoch-Smith Resolution and conducted and submitted at a time when the Commission was proceeding under the misapprehension of its powers and duties under the resolution, condemned by the Court in that case (R. 21, 69). At the time of its decision this case had been under review by the Commission, after submission, for a period of eleven months (R. 69). The final report was in course of preparation as early as November 1929, seven months prior to the decision of the Court (R. 21) . The record consisted of over 53,000 pages of transcript and more than 2,000 exhibits (R. 147). More than three score of major issues were involved (R. 147). It is not surprising if the Commission, including Mr. Eastman, within the thirty days available, failed to perceive the full import of the Court's decision and to reexamine this enormous record in the light thereof, but by reason of such failure of perception perpetuated in part, if not in whole, the error under which it had theretofore conducted and considered the case.

VIII

THE ORDER OF THE COMMISSION CANNOT BE SUSTAINED BY REASON OF THE FACT THAT THE COMMISSION AT THE SAME TIME READJUSTED MANY INEQUALITIES IN RATES, THEREBY REMOVING DISCRIMINATION.

In the Court below counsel for the appellees placed great reliance on this fact. The Commission by its order sought to exercise two powers: (1) To redetermine and establish the general level of the rates; (2) to correct and remove discrimination.

The propriety of its action in the ~~former~~ latter cannot cure the making of an order in respect of the ~~latter~~ former, if based upon a misconception of the powers and duties of the Commission. Moreover, the primary issue was that concerning the general level of the rates. This the report itself makes plain (R. 77, 147-8). The correction of individual maladjustments was more or less incidental for this task. Moreover, it is perfectly plain that all of the former could have been corrected and the revenues of the carriers preserved. It was unnecessary to reduce all of the rates or any of the rates to remove discrimination. It was certainly unnecessary to reduce the general level of the rates and the revenue of the carriers by 13%.

The power exercised on this branch of the case was under Section 3. The object of the proceeding was to bring the rate structure into harmony with all provisions of the act. This included Sec. 15a as well as Sec. 3. It appeared from the report that the revenues of the

carriers were far below the statutory standard. Under Sec. 15a the Commission was under the positive duty to protect and preserve such revenues so far as consistent with other requirements. Such course could have been pursued and every mandate of Sec. 3 heeded. The more stoutly counsel for appellees seek to sustain the order by reason of the fact that it revised the relationship of rates between grain and grain products themselves for the purpose of removing violations of Sec. 3, but on a materially lower general level of rates and at an unnecessary sacrifice of revenue, the more completely they convict the Commission of having acted in disregard of Sec. 15a. And if we be right in respect of our interpretation of Sections 1 and 15 and of the lack of any authority in the Commission to prescribe "the lowest possible lawful rates" as maximum reasonable rates under the circumstances presented, the more they convict the Commission of having acted in excess of the powers conferred by this section through the removal of such discrimination by the establishment of the lowest possible lawful rates.

IX

THE ULTIMATE FINDING WHICH THE REPORT CONTAINS THAT THE PRESENT RATES ARE UNREASONABLE TO THE EXTENT THAT THEY EXCEED THOSE PRESCRIBED IS NOT IN ITSELF SUFFICIENT TO SUPPORT THE ORDER.

In the court below the appellees relied heavily upon the fact that the report contains an ultimate finding, ex-

pressed in the words of the statute, that the present rates are unreasonable to the extent that they exceed the rates prescribed (R. 111). This alone is insufficient. The report reviewed in *Ann Arbor R. Co.* v. *United States, supra,* contained a similar finding in respect of which the Court said:

> "* * * True, in both the original and supplemental opinions it is said that the existing rates are unreasonable, but the opinions taken as a whole show that this means the rates were deemed unreasonable under the joint resolution when construed as the commission construed it, and not that they were deemed unreasonable under §1(5) or §3(1) of the Interstate Commerce Act. Throughout the opinions it is manifest that the commission was testing the reasonableness and validity of the rates by considerations not applicable under those sections but believed by it to have been brought into the problem by the resolution." (281 U. S., at p. 666.)

Prior to that decision it had become well settled that the making of such an ultimate finding, expressed in the words of the statute, is insufficient to support an order made, if it otherwise appears to have been based upon the application of standards other than those of the Interstate Commerce Act, or upon a misconception of the Commission's powers and duties. *Southern Pacific Co.* v. *Interstate Commerce Commission, supra,* 219 U. S. 433, 443. See also *Florida* v. *United States,* 282 U. S. 194, decided subsequently to the *Ann Arbor* case.

Such a finding is thus not conclusive in any case. Where, as in this case, there is an absence of any finding sufficient to support it, it is entitled to even less weight than ordinarily accorded such a finding.

Similarly, the Commission's statement that "the findings herein are under the provisions of the interstate commerce act" (R. 111*), is quite insufficient to support the order. A mere statement that the Commission has complied with the terms of a statute, naming the statute, can rise no higher than a statement expressed in the words of the statute (cases cited, *supra*), or a statement that the Commission has considered all the pertinent evidence (*Beaumont, S. L. & W. Ry. Co.* v. *United States*, 282 U. S. 74, 86), or that the Commission has carefully considered the various factors required by the statute to be considered by it (*Bluefield Co.* v. *Public Service Commission*, 262 U. S. 679, 688-689).

The statement made is no more than a declaration that the Commission proceeded under the Interstate Commerce Act, as it understood and interpreted it. The decision of any tribunal carries with it the declaration, whether expressed or not, that the tribunal making it has construed and properly applied the applicable law under which it is proceeding. If it appears, that it did not, its action will be set aside or reversed, however honest the belief thus expressed may have been. Judicial review of the Commission's orders may not be precluded by any such self-serving declaration.

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*The full statement by the Commission follows:

"FINDINGS UNDER INTERSTATE COMMERCE ACT

The Supreme Court of the United States recently interpreted the Hoch-Smith resolution as setting up no standard of reasonableness of rate level or relation other than that already provided by the interstate commerce act. *Ann Arbor Railroad Company* v. *United States*, U. S., , decided June 2, 1930. The findings herein are under the provisions of the interstate commerce act."

X

THE COMMISSION CONSIDERED MATTERS OUTSIDE OF THE RECORD. FOR THIS REASON ALONE, ITS ORDER IS VOID AND ITS ENFORCEMENT SHOULD BE ENJOINED.

Towards the conclusion of the report (R. 147) the Commission said:

> "The action here taken represents the fullest possible response to all the mandates of the law affecting, among other things, the important subjects of levels and relations of rates, the natural and proper development of the country as a whole, and the maintenance of an adequate system of transportation. The future volume of movement of wheat and other grains between specific points can not be accurately known. It follows that the revenue effects of the increases and decreases which will follow the effectiveness of our action herein can not be precisely stated. We have made many different *checks and estimates*. While the reductions far exceed the increases, and the corresponding revenue effects will be substantial, the full effect upon revenues can not be adequately foretold, in view of the limitations upon transit, the elimination of transit balances outbound from primary markets, and the greater safeguarding of revenues from wasteful competition that should follow the reduced level of rates. We are satisfied that the readjustment will not threaten the maintenance of an adequate system of transportation. We say this especially in the light of *increased revenues already granted in certain other*

cases, and in the realization that a failure of the present revision to afford adequate revenues will prompt further proceedings." (Italics ours.)

The Commission thus declares that it was required (by the "mandate of the law") to consider, among other things, the effect of its action upon the maintenance of an adequate system of transportation. Its statement "that the readjustment will not threaten the maintenance of an adequate system of transportation" is a finding of fact in respect of this issue. It was a finding essential to the decision rendered, on the Commission's own theory of its powers and duties, whether erroneous, as we have urged, or not. The Commission had already found that the carriers' revenues were and had been continuously for a long period of years below those required by Section 15a (R. 77). It knew that the order proposed to be made would materially reduce such revenues still further (R. 148). Its finding that these reductions would not, however, threaten the maintenance of an adequate system of transportation was based upon (1) certain checks and estimates of the revenue effects of the action to be taken, and (2) the effect of action taken in certain other cases in increasing revenues. This essential finding of fact, therefore, was based upon balancing the revenue effects of the reductions proposed to be ordered, on the one hand, and the increased revenues supposed to be produced from action taken in other cases on the other hand. The correctness of the conclusion reached, therefore, depended upon the correctness of the two estimates thus made and balanced against each other. This was clearly a finding of fact upon a material issue

and as such required to be based upon evidence. The carriers were entitled to an opportunity to be confronted with both sets of estimates, to check them, to cross-examine their makers and to offer evidence in rebuttal.

It is alleged in the bill that none of the evidence of estimates relied on was of record in the case (R. 31-2). This allegation is supported in addition by the affidavits of counsel representing the carriers in the conduct of the case (R. 654-6). No counter-affidavits were filed. It is true that the record, consisting of 53,000 pages and 2,100 exhibits, was not offered for the purpose of establishing the truth of this allegation. On the application for a temporary injunction the allegations of the bill and the uncontradicted affidavits of counsel should be taken as true.

Moreover, checks and estimates of losses resulting from the order could not possibly have been in the record for they were checks and estimates of the revenue effects of the order itself, which could not have been determined —even approximately—prior to its rendition.

In so far as the effect of the supposed increases from other cases is concerned it appears from the concurring opinion of Commissioner Woodlock that chief among these cases was the so-called *Class Rates* case (R. 187) (*Western Trunk-Line Class Rates,* 164 I. C. C. 1). This case was decided long after the close of the record in the present case (R. 533) and any estimate of increased revenues which might be received from it could not possibly have been made before the close of the record in the present case or been available for cross examination of the carrier.

Moreover, in their petition for rehearing the carriers alleged and offered to show that any assumption that revenues would be substantially increased as a result of the decision in the *Class Rates* case was wholly erroneous and that whether any increased revenue at all would result was doubtful.

The order of the Commission is thus predicated upon a balancing of estimated decreases, on the one hand, and estimated increases, on the other, neither of which were of record and neither of which the carriers ever had any opportunity to examine or correct. The rule that the Commission's order will be set aside if based upon the consideration of matters outside of the record is not a mere technical rule but one essential for the proper protection of the carriers. In *Interstate Commerce Commission* v. *Louisville & Nashville Ry. Co.*, 227 U. S. 88, 93, the Court said:

> "But the more liberal the practice in admitting testimony, the more imperative the obligation to preserve the essential rules of evidence by which rights are asserted or defended. In such cases the Commissioners cannot act upon their own information as could jurors in primitive days. All parties must be fully apprised of the evidence submitted or to be considered, and must be given opportunity to cross-examine witnesses, to inspect documents and to offer evidence in explanation or rebuttal. In no other way can a party maintain its rights or make its defense."

In the more recent case of *U. S.* v. *Abilene & Southern Ry. Co.*, 265 U. S. 274, the order of the Commission was set aside because it considered figures contained in

the annual reports of the carriers which they are required to submit to the Commission under oath each year. In setting the order aside, Mr. Justice Brandeis said, page 289:

> "The objection to the use of the data contained in the annual reports is not lack of authenticity or untrustworthiness. It is that the carriers were left without notice of the evidence with which they were, in fact, confronted, as later disclosed by the finding made. The requirement that in an adversary proceeding specific reference be made, is essential to the preservation of the substantial rights of the parties."

The figures upon which the Commission's finding of fact was based were not only open to the criticism made by Mr. Justice Brandeis, but to the additional criticism that their authenticity and accuracy is likewise in question.

XI

THE ACTION OF THE COMMISSION IN OVERRULING THE CARRIERS' PETITIONS FOR REHEARING AND THUS REQUIRING THE ORDER TO BECOME EFFECTIVE AND IN FAILING TO DISCHARGE THE AFFIRMATIVE DUTY IMPOSED BY SECTION 15a TO PROTECT THE CARRIERS' REVENUES IS SO ARBITRARY AND UNREASONABLE AS TO RENDER ITS ORDER VOID AND AS TO ENTITLE THE PETITIONERS TO ENJOIN ITS ENFORCEMENT.

1. The carriers submitted in petitions for rehearing and offered to prove facts showing a fundamental change for the worse in the condition of their revenues and the relation thereto of the grain rates, in the years following the close of the record herein and prior to the effective date of the order herein. These petitions were summarily denied by the Commission, which thereby put the order into effect on a record closed nearly three years before.

The record herein was closed September 22, 1928 (R. 8). The Commission's order was made effective June 1, 1931 (R. 9).

The authority exercised by the Commission was not merely the authority to make findings and to enter an order but to make the same effective. The order operates *in futuro*. It had not become effective at the time the petitions for rehearing were filed, at which time the attention of the Commission was called to the

fact that the order was granted upon a stale record, unrepresentative of present or future conditions. The changed conditions, which had in the interim so seriously affected the revenues and credit of the carriers as to impair the maintenance of an adequate system of transportation, were fully set forth (R. 421, 507).

If there ever may be a case in which the action of the Commission may be set aside because arbitrary and unreasonable, although taken within the form of its delegated powers (*Interstate Commerce Commission* v. *Illinois Central R. R. Co.*, 215 U. S. 452, 470; *Interstate Commerce Commission* v. *Union Pacific R. R. Co.*, 222 U. S. 541, 547), this would appear to be such a case. If the facts set forth in the petition are true, and they must be taken to be so, the making of these reductions effective at this time is a palpable disregard of the continuing duty imposed upon the Commission by Sec. 15a. Whether the order as originally made was valid or not, the Commisison in refusing to rehear and consider, to take the evidence offered in respect of changed conditions alleged, in addition to acting arbitrarily and unreasonably, plainly failed to discharge the duty imposed upon it by Sec. 15a.

As we have pointed out, rate orders of the Commission operate *in futuro*. It is contemplated that they should be responsive to present and future conditions and not to those of the past, when unrepresentative of present and future conditions. While the granting or refusing of a petition for rehearing rests, in the first instance, within the discretion of the Commission, that discretion must not be abused. The substance of the

allegations contained in the petition for rehearing were matters of common knowledge, although the precise figures were not. In such a case, to refuse to rehear and reconsider and in the meantime to postpone the effective date of the order, puts the Commission in the position of declaring that, despite the provisions of Sec. 15a, the Commission may reduce the net railway operating income of the carriers $20,000,000 per year, at a time when their rate of return is approximately but 3%, and their net railway operating income $234,000,000 less than the contemplated by such section, and at a time when their gross and net revenues are still falling, and notwithstanding that the credit as well as the financial condition of the carriers have been adversely affected by the facts stated (R. 511 *et seq.*). If the Commission in any report should so state its conception of its duties under Sec. 15a, an order based thereon would be clearly void because of the Commission's disobedience of the affirmative mandate of the statute and of its failure to discharge its duty.

In this connection, it is significant to compare the reasoning behind the recent decision of the Commission in the *Fifteen Per Cent* case (*Ex parte 103*), 178 I. C. C. 539, in which the Commission, although recognizing that the carriers' rate of return throughout the country was far below the statutory rate of return, denied to the carriers a horizontal increase on the ground, among others, that the provision of horizontal increases or horizontal decreases throughout the entire rate structure was not an effective way of giving effect to the requirements of Section 15a. If, on the one hand, the Commission says that it cannot give effect to the require-

ments of Section 15a in a rate case dealing with all the rates and, on the other hand, refuses to give effect to it in a rate case dealing with a description of traffic yielding 12 per cent of the rates (this case, R. 78), Section 15a may be taken to have been finally written out of the Act so far as practical use is concerned. If the Commission can reduce the rates on the heavy-loading commodities such as grain which are not in practice carried in large quantities by competitors of the rail carriers (R. 522-528, 529), and on the other hand can refuse to increase other classes of rates because in the opinion of the Commission the new rates would drive the business to such competitors, the rail carriers may as well reconcile themselves to the fact that their legal rights are in the future confined to maintaining all of their rates at or near the lowest possible lawful level.

2. In the main report the Commission had based its decision in part upon an anticipation that its failure to provide adequate revenues would prompt the carriers to bring future proceedings to protect those revenues, and to that extent based its decision in part upon a mere chance that it would prove right instead of basing it exclusively (as was its duty) upon the evidence before it.

The conclusion of the Commission was:

> "We are satisfied that the readjustment will not threaten the maintenance of an adequate system of transportation. We say this especially in the light of increased revenues already granted in certain other cases *and in the realization that the*

> *failure of the present provision to afford adequate revenues will permit further proceedings.*" (R. 148; italics ours.)

The last clause is a statement that the Commission relied in part in making its decision, not merely upon facts not of record before it, but on a hope or gamble that if the decision it was making was a wrong one, the injured party would protest. It is the duty of an administrative body to reach its decisions through the application of its best judgment to the facts of record before it. The sentence quoted was a confession by the Commission that its conclusion as to the maintenance of an adequate system of transportation was not exclusively based upon the facts of record before it, but was based in part (as we have seen) upon facts not of record, and in part upon the fact that the Commission was so desirous for other reasons to reach the conclusion in question that it was willing consciously to gamble upon the soundness of its conclusion as to the maintenance of an adequate system of transportation. It is unthinkable that a court should reach any decision in a *realization* that if the decision be wrong, the aggrieved party will appeal. Yet the Commission's action here is precisely of the same nature. In effect, the Commission says that it might not have reached this decision if it had been convinced that the injured parties (the carriers) would not be in a position to bring another suit if the decision proved wrong. Surely what is justice for one is justice for another. The Commission cannot be allowed to gamble with impunity the revenues of the transportation system of the country.

and to take action which will threaten the adequate maintenance of that transportation system, because the Commission takes into consideration that the carriers will protest if hurt. This simply means that the Commission has felt free to take a chance on whether its decision is right or wrong.

Such action amounts in effect to the denial of a fair hearing, constitutes an abuse of administrative discretion and renders the order void as in violation of the Fifth Amendment to the Constitution of the United States. The carriers' property is taken, not because the Commission has reached its conclusions after hearing evidence, but because the Commission is taking a chance in reliance on its "realization" that the carriers will protest if hurt. It is submitted that this is not due process of law.

The precarious position into which the maintenance of an adequate system of transportation is brought through this disregard by the Commission of the mandates of Section 15a, is proven by the subsequent events in this case. The carriers' petitions for rehearing represented their effort to bring the very proceedings which the Commission had *realized* that the carriers would bring if their revenues proved inadequate. That realization was, as we have seen, actually one of the grounds for the Commission's decision. Yet when the carriers' revenues in fact proved inadequate,—when over three years had elapsed since the close of the record and the carriers' revenues had fallen from an average of 3.9% (R. 77) to 3.1% (R. 518) and were evidently still falling, and at an accelerated pace (R. 513),—the Commission disposed

of the carriers' offer to prove those facts and all relevant facts by denying the petition for rehearing which such offer was contained, just 13 days after was filed (R. 39).

Respectfully submitted,

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